Supreme Court of the United States

OCTOBER TERM, 1962

No. 632

UNITED STATES, PETITIONER

vs.

AARON ZACKS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

INDEX

[fol. 9] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

[Title Omitted]

MOTION TO STRIKE SECOND DEFENSE—Filed
February 4, 1960

Come now the plaintiffs, by their attorney, and move the Court to enter an order striking the second defense in the answer filed by the defendant on May 4, 1959.

In support of their motion plaintiffs rely on Public Law 629 approved June 29, 1956, and the accompanying brief in support of the motion.

WHEREFORE it is prayed that the motion be granted.

SCOTT P. CRAMPTON,
815 Bowen Building,
Washington 5, D. C.
Attorney for Plaintiffs.

ROBERT F. CONRAD,
Watson, Cole, Grindle & Watson,
815 - 15th Street, N. W.,
Washington 5, D. C.,
Of Counsel.

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[fol. 25] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

[Title Omitted]

MOTION OF THE UNITED STATES TO DISMISS—
February 24, 1960.

Comes now the defendant, United States of America, by its attorneys, and moves the Court to dismiss the above action on the ground that the Court lacks jurisdiction over the subject matter of the petition for reason that the claim for refund was not filed within the time prescribed by law as affirmatively appears from the petition and attached affidavit of George T. Qualley.

/s/ Charles K. Rice
CHARLES K. RICE,
Assistant Attorney General.

/s/ George T. Qualley
GEORGE T. QUALLEY,
Attorney.

[fol. 26]

AFFIDAVIT OF GEORGE T. QUALLEY

CITY OF WASHINGTON)
) SS:
DISTRICT OF COLUMBIA)

George T. Qualley, being duly sworn deposes and says:

1. That he is an attorney with the Department of Justice, Washington, D. C., and is thoroughly familiar with the subject matter of this suit, and with the records and files of the Internal Revenue Service pertaining thereto.

2. That having examined such records and files, he finds the plaintiffs' Federal Income Tax return for the calendar year 1952 bears the marking:

Received
April 15, 1953
33 Dir. Int. Rev.
Columbus

3. That having examined such records and files, he also finds that a copy of Certificate of Assessments and Payments for the plaintiffs' 1952 account, bearing the signature of the District Director of Internal Revenue, Columbus 15, Ohio, indicates that by September 28, 1953, plaintiffs had paid the entire amount of its assessed tax liability for 1952 plus interest of $218.24.

/s/ George T. Qualley
GEORGE T. QUALLEY
Attorney
Department of Justice

[fol. 27]

City of Washington
District of Columbia

Subscribed and sworn to before me this 24th day of February, 1960.

/s/ W. E. House
Notary Public
District of Columbia

[SEAL]

My Commission expires: January 31, 1965.

[fols. 28-69] * * *

[fol. 70] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

AARON ZACKS and FLORENCE ZACKS

v.

THE UNITED STATES

Mr. Scott P. Crampton for plaintiffs. *Messrs. Robert F. Conrad,* and *Watson, Cole, Grindle & Watson* were on the briefs.

Mr. George T. Qualley, with whom was *Mr. Assistant Attorney General Charles K. Rice,* for defendant. *Messrs. James P. Garland* and *Lyle M. Turner* were on the brief.

OPINION—Decided July 15, 1960

ON PLAINTIFFS' MOTION TO STRIKE DEFENDANT'S SECOND DEFENSE AND DEFENDANT'S MOTION TO DISMISS PETITION

WHITAKER, *Judge,* delivered the opinion of the court:

Plaintiffs sue for the recovery of an overpayment of income taxes by reason of having reported royalties received from patents as ordinary income. They allege that the amount paid was correctly computed according to the law, as interpreted by the rulings of the Internal Revenue Bureau, at the time it was paid, but that later Congress amended the Internal Revenue Code retroactively so as to provide that the amount received as royalties should be returned as capital gains rather than as ordinary income, which resulted in an overpayment.

The defendant interposes the defense that no claim for refund of the amount of the overpayment was filed within the statutory period. Plaintiffs reply that the amendment of the Internal Revenue Code, referred to above, created a

[fol. 1]

IN THE UNITED STATES COURT OF CLAIMS

No. 104-59

AARON ZACKS AND FLORENCE ZACKS, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

PETITION—Filed March 5, 1959

To the Honorable United States Court of Claims:

Plaintiffs respectfully represent to the Court:

1. This is an action to recover income taxes paid by the plaintiffs for the calendar year 1952 in the amount of $10,636.06 and is brought under the provisions of 28 U. S. C. § 1491 and § 117(q) of the Internal Revenue Code of 1939, as added by Public Law 629, approved June 29, 1956.

2. Plaintiffs are individuals residing at 140 North Parkview Road, Columbus, Ohio. They bring this action in their own right.

3. For the calendar year 1952 plaintiffs as husband and wife filed a joint Federal income tax return in which they reported a taxable net income of $45,619.89 and an in-[fol. 2] come tax liability of $19,781.14 which was paid by them within the time allowed by law.

4. Plaintiffs keep their books and records and file their Federal income tax returns on the cash receipts and disbursements basis of accounting and by calendar years. The income tax return and the claim for refund here involved were filed with the District Director of Internal Revenue for the Eleventh District of Ohio at Columbus, Ohio.

5. The plaintiff Florence Zacks is an inventor and the holder of United States Letters Patent numbered 2,422,161; 2,441,785; 2,497,808; and 2,563,092. All of her substantial rights in the aforesaid patents were transferred by Florence Zacks to a manufacturing corporation in exchange for its agreement to pay royalties to her at the rate of 3 per cent upon the manufacture and sale or use of products covered by said inventions.

6. During 1952 plaintiff Florence Zacks received $36,768.65 as royalties from the manufacturing corporation in connection with its use of the aforesaid patents. The items involved, the number of the patent pertaining to each, and the amount of the royalties paid to Florence Zacks in 1952 on each invention are respectively as follows:

Name of Invention	Patent Number	Royalty Received
Lady Barry Shoulder Pads	2,422,161	$ 6.96
Barry Foam Shoulder Pads	2,441,785	1,550.98
Barry Bone Shoulder Pads	2,497,808	150.10
Angel Treads Slippers	2,563,092	35,060.61
		$36,768.65

7. In their Federal income tax return for 1952 plaintiffs reported the aforesaid royalties in the amount of $36,768.65 as ordinary income. This action on the part of plaintiffs was in accord with the then existing rul- [fol. 3] ings of the Internal Revenue Service.

8. On June 29, 1956, Congress enacted Public Law 629 which added § 117(q) to the Internal Revenue Code of 1939. The new provision was made applicable to the calendar year 1952. Under said § 117(q) royalties paid as a result of a transfer of all substantial rights to a patent may be reported by the inventor as long-term capital gains. The royalties received by plaintiff in 1952 resulted from a transfer by her of all substantial rights to her patents within the provisions of § 117(q) of the Internal Revenue Code of 1939.

9. On or about June 23, 1958, plaintiffs filed a claim for refund on Treasury Department Form 843, in which they sought a refund of $11,076.68 on the ground that they

had included as ordinary income in their return for 1952 royalties which they had received as aforesaid and which under Public Law 629 referred to above were taxable as long-term capital gain.

10. More than six months have elapsed without any action having been taken by the Commissioner of Internal Revenue with regard to the aforesaid claim for refund.

11. No part of the taxes paid by plaintiffs as aforesaid has been refunded. Based on the facts herein stated and after allowing all just credits and offsets, plaintiffs are justly entitled to recover the sum of $10,636.06 of the taxes paid together with interest thereon from the dates of payment as provided by law.

12. Plaintiffs are the sole owners of the claim herein sued upon. No transfer or assignment has been made of said claim and no action other than as aforesaid has been had thereon. Plaintiffs have exhausted their administrative remedies.

[fol. 4] WHEREFORE, plaintiffs demand judgment against defendant for $10,636.06, together with interest and costs as provided by law.

AARON ZACKS AND FLORENCE ZACKS,
Plaintiffs,

By SCOTT P. CRAMPTON,
815 Bowen Building,
Washington 5, D. C.,
Attorney for Plaintiffs.

ROBERT F. CONRAD,
Watson, Cole, Grindle & Watson,
815 - 15th Street, N.W.,
Washington 5, D. C.

Of Counsel.

[fol. 5]

IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

[Title Omitted]

ANSWER—Filed May 4, 1959

For its answer to the Petition, defendant admits, denies and alleges as follows:

FIRST DEFENSE

I.

Admits that this purports to be an action of the nature described in Paragraph 1; denies, however, that it has any basis in fact; and, denies this Court has any jurisdiction over the subject matter of the action for reasons hereinafter set forth in the affirmative or second defense.

II.

Admits the allegations contained in Paragraph 2, except denies that plaintiffs have any "right" to bring this action.

[fol. 6]

III.

Admits the allegations contained in Paragraph 3.

IV.

Denies the allegations contained in Paragraph 4, not otherwise expressly admitted in this answer.

V.

Denies the allegations contained in Paragraph 5 for lack of information sufficient to form a belief as to the truth thereof.

VI.

Denies the allegations contained in Paragraph 6 for lack of information sufficient to form a belief as to the truth thereof.

VII.

Admits the allegations contained in Paragraph 7, except denies that it has information sufficient to form a belief as to the source of royalties reported on plaintiffs' 1952 income tax return, and avers that the amount reported thereon was $38,604.55 instead of as alleged therein.

VIII.

Regarding Paragraph 8: admits the allegation contained in the first sentence; denies that the allegations in the second and third sentences accurately and completely describe the statutory provision referred to therein; and, denies the allegations contained in the fourth sentence.

IX.

Admits that plaintiffs filed a claim for refund in the manner alleged in Paragraph 9, but specifically denies [fol. 7] each and every substantive allegation made therein, and further denies that such claim was duly filed within the time allowed by law as hereinafter set forth in the affirmative or second defense.

X.

Admits the allegations contained in Paragraph 10.

XI.

Admits the allegation in the first sentence of Paragraph 11 but denies all the allegations subsequent thereto.

XII.

Denies the allegations contained in Paragraph 12 for lack of information sufficient to form a belief as to the truth thereof.

SECOND DEFENSE

A.

Plaintiffs filed their joint income tax return for the year 1952 on April 15, 1953, and made their last payment on the 1952 income tax on or before September 28, 1953.

B.

Plaintiffs filed a claim for refund of 1952 income taxes on June 23, 1958.

C.

Section 7422(a) of the Internal Revenue Code of 1954 provides that no suit or proceeding shall be maintained in any Court for recovery of any internal revenue tax until a claim for refund has been duly filed. Section 322(b)(1) and Section 6511(a) of the 1939 and 1954 Internal Reve-[fol. 8] nue Codes respectively, provide that no claim for refund may be credited or paid unless it was filed within three years from the time of filing the return or within two years from the time that the tax was paid, whichever is later.

D.

Section 117(q) of the Internal Revenue Code of 1939, added by Public Law 629, approved June 26, 1956, neither extends the aforesaid limitation for filing of refund claims nor does it provide a new cause of action against the United States.

E.

Plaintiffs' action for refund of income taxes for the year 1952 is consequently barred by the express statutory provisions referred to in Paragraph C and the Court lacks jurisdiction over the subject matter of this action.

Wherefore, defendant prays that the Petition be dismissed with costs assessed against the plaintiffs.

CHARLES K. RICE,
Assistant Attorney General.

GEORGE T. QUALLEY,
Attorney.

[fol. 84] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

AARON ZACKS AND FLORENCE ZACKS

v.

THE UNITED STATES

ORDER OF THE COURT ENTERING JUDGMENT—
July 6, 1962

This case comes before the court on a stipulation of the parties filed July 2, 1962, signed on behalf of the plaintiffs and the defendant by their respective attorneys, in which it is stated that a proposal was submitted by the plaintiffs and was duly accepted on behalf of the defendant, whereby plaintiffs agreed to accept the sum of $4,624.09, with interest thereon as allowed by law, in full settlement of all claims set forth in the petition, without prejudice, however, to defendant's right to file a petition for certiorari in the Supreme Court to review the question whether plaintiffs' claim for refund and suit herein were timely filed, and the defendant consented to the entry of judgment in that amount and upon such condition.

Now, THEREFORE, IT IS ORDERED that judgment be and the same is entered for the plaintiffs in the sum of four thousand six hundred twenty-four dollars and nine cents ($4,624.09), with interest thereon as allowed by law.

BY THE COURT,

MARVIN JONES,
Chief Judge.

[fol. 85]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 86] IN THE

UNITED STATES COURT OF CLAIMS

No. 104-59

AARON ZACKS AND FLORENCE ZACKS, PLAINTIFFS

vs.

THE UNITED STATES, DEFENDANT

DEPOSITION

* * * *

[fol. 87] FLORENCE ZACKS

being by me first duly sworn, as hereinafter certified, deposes and says as follows:

DIRECT EXAMINATION

BY MR. CRAMPTON:

Q. Mrs. Zacks, will you state your full name, please?
A. Florence Zacks.
Q. And what is your occupation?
A. I am an inventor.
Q. How long have you been engaged in that occupation?
A. Since 1945.
Q. Have any United States Patents ever been issued to you?
A. Yes.

* * * *

[fol. 88] Q. Now, we have talked so far about four or five patents. Have other patents been issued to you?
A. Yes.
Q. Do you know roughly how many?
A. I'm afraid I don't know how many. I can think of two specific ones at the moment in addition, or there are—I don't know just how many, Mr. Crampton, but I think of three others—four others at this moment that I have in addition to those that were on exhibits here.
Q. That have been issued to you?
A. That have been issued to me.

new cause of action, and that the statute of limitations did not begin to run until after its passage.

[fol. 71] The Act upon which plaintiffs rely is Public Law 629, passed on June 29, 1956 (70 Stat. 404). It added section 117(q) to the Internal Revenue Code of 1939. This section reads:

> (q) *Transfer of Patent Rights.*—
>
> (1) *General Rule.*—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are—
>
> (A) payable periodically over a period generally coterminous with the transferee's use of the patent.
>
> (B) contingent on the productivity, use, or disposition of the property transferred.
>
> * * * * * *
>
> (4) *Applicability.*—This subsection shall apply with respect to any amount received, or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred. [Added by § 1 of the Act of June 29, 1956, c. 464, 70 Stat. 404]

The taxable year in question is 1952; thus, section 117 (q) applies to this taxable year, and if it created a new cause of action, plaintiffs' suit is in time, having been filed just a few days less than two years from the passage of the Act.

Plaintiffs' petition alleges that the law in effect prior to the passage of the Act of June 29, 1956, was construed by the Internal Revenue Bureau to require a taxpayer to report patent royalties as ordinary income. The defendant admits this in its answer. For the rulings of the Bureau see Mim. 6490, 1950-1 Cum. Bull. 9; Revenue Ruling 55-58, 1955-1 Cum. Bull. 97.

However, at the time of the passage of P.L. 629, *supra*, there were a number of court decisions to the contrary:

Myers v. *Commissioner*, 6 T.C. 258; *Kronner* v. *United States*, 126 Ct. Cl. 156; *United States* v. *Carruthers*, 219 F. 2d 21 (C.A. 9th); *Commissioner* v. *Celanese Corp.*, 140 F. 2d 339 (C.A.D.C.); and *Commissioner* v. *Hopkinson*, 126 F. 2d 406 (C.A. 2d). But, notwithstanding these court [fol. 72] decisions, the Bureau of Internal Revenue persisted in its interpretation and continued to require taxpayers to report such income as ordinary income.

It is well settled law, needing no citation of authority, that a taxpayer is bound to follow the interpretations of the law by the agency charged with its administration. This being true, plaintiffs had no option other than to report the income from patent royalties as they did report them. If plaintiffs believed that the interpretation of the law was incorrect, they were of course entitled to file a claim for refund and undertake to convince the Bureau of Internal Revenue of its error, and, in default thereof, they were entitled to bring suit to test the matter in the courts, as other taxpayers had done. The plaintiffs instead, no doubt influenced by the failure of other taxpayers to secure a reversal of the Bureau's rulings, did not question the correctness of what the governmental agency in charge of the enforcement of the law had ruled, but acquiesced in it, and paid their taxes accordingly.

Then, in view of the stubborn persistence of the Bureau in its interpretation of the law, and of its refusal to follow the decisions of this court and of three of the Circuit Courts of Appeals and of the Tax Court, Congress felt it necessary to pass an Act to set aside the law as interpreted by the Bureau, and to expressly provide that income from royalties might be reported as capital gains.

We think this gave to a taxpayer a right that he had not had before. At least, it gave him a right which the agency charged with the administration of the prior law said he did not have.

Furthermore, we think Congress must have intended to give some taxpayers a right which it must have known had long since been barred by the statute of limitations. Public Law 629 was passed on June 29, 1956; it was made applicable to all taxable years beginning after May 31, 1950; Congress must have known that the statute of limitations, which requires the filing of a claim for refund

within three years after the return was filed, or within two years from the time the tax was paid, had long since run as to many taxpayers with respect to several of the years to which Public Law 629 was applicable?

[fol. 73] Defendant says Congress intended Public Law 629 to apply only to those taxpayers who had filed claims for refund within time. There is no such express limitation and there is nothing in the Act itself or in its history to indicate Congress had any such intention. The Act was made applicable to the barred years without restriction.

We cannot escape the conclusion that, at least insofar as taxable years barred by the statute of limitations are concerned, Congress intended by the passage of Public Law 629 to give taxpayers a right which they did not have before its passage. Had they not so intended, it was an idle gesture to have made it applicable to years as far back as 1950.

In *Verckler* v. *United States*, No. 361-57 Ct. Cl., decided March 4, 1959, 170 F. Supp. 802, we held that the remedial legislation involved in that case created a new cause of action and that a suit to recover was not barred because a claim for refund had not been filed within three years from the time the return was filed, or within two years from the time the taxes were paid. The Second Circuit Court of Appeals, in *Hollander* v. *United States*, 248 F. 2d 247, was of the same opinion. However, the Sixth Circuit Court of Appeals, in *United States* v. *Dempster*, 265 F. 2d 666, and the Fifth Circuit in *Tobin* v. *United States*, 264 F. 2d 845, were of a contrary opinion. We are convinced of the correctness of the view we take of the instant case and, therefore, notwithstanding our great respect for the Fifth and Sixth Circuit Courts of Appeals, we must decline to follow them.

It results that plaintiffs' motion to strike the defendant's second defense, raising the issue just discussed, must be granted. This defense will, therefore, be stricken. Defendant's motion to dismiss plaintiff's petition is denied.

The case is returned to the Trial Commissioner for further proceedings not inconsistent with this opinion.

It is so ordered.

DURFEE, *Judge;* LARAMORE, *Judge;* MADDEN, *Judge;* and JONES, *Chief Judge,* concur.

[fol. 74]

IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

[Title Omitted]

AMENDMENT TO THE PETITION—Filed
November 29, 1961

Pursuant to leave of Court the introductory two sentences of paragraph 6 of the petition are amended to read as follows:

> 6. During 1952 plaintiff Florence Zacks received \$36,768.65 as royalties from the manufacturing corporation in connection with its use of the aforesaid patents and the antecedent patent application in the case of patent No. 2,563,092. The items involved, the number of the patent pertaining to each invention, and the amount of the royalties paid to Florence Zacks in 1952 on each invention are respectively as follows:

AARON ZACKS AND FLORENCE ZACKS,
Plaintiffs,

By SCOTT P. CRAMPTON,
404 Transportation Building,
Washington 6, D. C.,
Attorney for Plaintiffs.

ROBERT F. CONRAD,
Watson, Cole, Grindle & Watson,
815 - 15th Street, N. W.,
Washington 5, D. C.,

Of Counsel.

[fol. 76] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

[Title Omitted]

ANSWER TO PLAINTIFF'S AMENDMENT TO THE PETITION—filed December 1, 1961

The defendant, the United States of America, files its answer to plaintiffs' amendment to the petition as follows:

6. Denies the amendment to the first two sentences of paragraph 6.

WHEREFORE, defendant prays that plaintiff take nothing herein, that its petition be dismissed, that defendant recover its costs of Court and for such other and further relief to which defendant may be justly entitled.

LOUIS F. OBERDORFER
Assistant Attorney General

JERRY M. HAMOVIT
Attorney

[fol. 78] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

[Title Omitted]

STIPULATION—Filed July 2, 1962

It is hereby stipulated and agreed by and between the parties, through their respective counsel, that, pursuant to plaintiffs' proposal of December 11, 1961, as amended on June 4, 1962, accepted on behalf of defendant on June 6, 1962, the following facts may be taken as true, for the purpose of this proceeding only:

1. In their tax return filed for the calendar year 1952 plaintiffs reported $38,604.55 as income from "Royalties." Of this amount $15,035.98 was received in exchange for the transfer (other than by gift, inheritance or devise) of property consisting of all substantial rights to certain [fol. 79] patents held by taxpayer Florence Zacks, whose efforts created such property. The transfer by Florence Zacks just referred to was to a corporation less than 50% of the stock of which she owned, directly or indirectly.

2. In their tax return filed for the calendar year 1952 taxpayers claimed a deduction of $2,169.00 for "Contributions." The plaintiffs agree that this amount may be reduced to $1,784.00.

3. In their tax return filed for the calendar year 1952 taxpayers claimed a deduction of $306.00 for "legal fee re work on patents." Plaintiffs agree that this amount may be disallowed as a deduction.

4. Upon the basis of the facts hereinabove set forth and those admitted in the pleadings, the parties hereto consent to the entry of judgment in favor of plaintiffs in the amount of $4,624.09 with interest thereon as allowed by law in full satisfaction of the claim alleged in the petition herein.

Nothing contained herein shall be construed to prejudice the Government's right to file a petition for certiorari [fol. 80] in the Supreme Court to review the question

whether taxpayers' claim for refund and suit in the Court of Claims were timely filed. Nothing contained herein shall be construed to affect taxpayers' tax liability for any year other than 1952.

/s/ Scott P. Crampton
Attorney for Plaintiffs

/s/ Louis F. Oberdorfer
Assistant Attorney General

[fol. 81] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

AARON ZACKS AND FLORENCE ZACKS

v.

THE UNITED STATES

MEMORANDUM REPORT FOR JUDGMENT—Filed July 3, 1962

To the Honorable the CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

The petition in the above-entitled cause was filed on March 5, 1959, to recover the sum of $10,636.06, plus interest. The claim is for the recovery of an alleged overpayment on plaintiffs' 1952 income taxes in that royalties received by them were reported as ordinary income, whereas, pursuant to Public Law 629 approved June 29, 1956, which was applicable to the year 1952, such royalties as were herein involved (i.e., paid as a result of a transfer of all substantial rights to a patent) were permitted to be reported by the inventor as long-term capital gains.

On May 4, 1959, defendant filed its answer herein in which, as a second defense, it alleged lack of jurisdiction in the court over the subject matter in that plaintiffs had not, prior to the passage of Public Law 629, filed a claim for refund of the amount of the overpayment within the statutory period and that said Public Law neither extended the time for the filing of such claims nor created a new cause of action.

[fol. 82] On February 4, 1960, plaintiffs filed a motion to strike said second defense, and by decision of July 15, 1960, the court granted said motion and returned the case to the trial commissioner for further procedings.

Thereafter, a trial was had and proof was closed. However, prior to the filing of the commissioner's report, a written stipulation, signed by plaintiffs' attorney of record and by Assistant Attorney General Louis F. Oberdorfer,

was filed herein, which settles all the issues in the case except the issue decided by the court. The stipulation provides as follows:

It is hereby stipulated and agreed by and between the parties, through their respective counsel, that, pursuant to plaintiffs' proposal of December 11, 1961, as amended on June 4, 1962, accepted on behalf of defendant on June 6, 1962, the following facts may be taken as true, for the purpose of this proceeding only:

1. In their tax return filed for the calendar year 1952 plaintiffs reported $38,604.55 as income from "Royalties." Of this amount $15,035.98 was received in exchange for the transfer (other than by gift, inheritance or devise) of property consisting of all substantial rights to certain patents held by taxpayer Florence Zacks, whose efforts created such property. The transfer by Florence Zacks just referred to was to a corporation less than 50% of the stock of which she owned, directly or indirectly.

2. In their tax return filed for the calendar year 1952 taxpayers claimed a deduction of $2,169.00 for "Contributions." The plaintiffs agree that this amount may be reduced to $1,784.00.

3. In their tax return filed for the calendar year 1952 taxpayers claimed a deduction of $306.00 for "legal fee re work on patents." Plaintiffs agree that this amount may be disallowed as a deduction.

4. Upon the basis of the facts hereinabove set forth and those admitted in the pleadings, the parties hereto consent to the entry of judgment in favor of plaintiffs in the amount of $4,624.09 with interest thereon as allowed by law in full satisfaction of the claim alleged in the petition herein.

[fol. 83] Nothing contained herein shall be construed to prejudice the Government's right to file a petition for certiorari in the Supreme Court to review the question whether taxpayers' claim for refund and suit in the Court of Claims were timely filed. Nothing contained herein shall be construed

to affect taxpayers' tax liability for any year other than 1952.

Based on the foregoing, it is recommended that an order be entered as follows:

This case comes before the court on a stipulation of the parties filed July 2, 1962, signed on behalf of the plaintiffs and the defendant by their respective attorneys, in which it is stated that a proposal was submitted by the plaintiffs and was duly accepted on behalf of the defendant, whereby plaintiffs agreed to accept the sum of $4,624.09, with interest thereon as allowed by law, in full settlement of all claims set forth in the petition, without prejudice, however, to defendant's right to file a petition for certiorari in the Supreme Court to review the question whether plaintiffs' claim for refund and suit herein were timely filed, and the defendant consented to the entry of judgment in that amount and upon such condition.

NOW, THEREFORE, IT IS ORDERED that judgment be and the same is entered for the plaintiffs in the sum of four thousand six hundred twenty-four dollars and nine cents ($4,624.09), with interest thereon as allowed by law.

Respectfully submitted,

/s/ Saul Richard Gamer,
SAUL RICHARD GAMER,
Commissioner.

Q. Do you have patent applications pending that may not have been issued other than those that you mentioned?

A. Yes, I do.

Q. Now, have you ever perfected any invention or improvements which have not been patented?

A. Yes.

Q. And have you ever received any royalties on such unpatented inventions?

[fol. 89] A. No, not to my knowledge.

Q. Would Swishees be a—

A. Oh, yes.

Q. The type of thing I am referring to.

A. Yes.

Q. So then your answer that you have received others?

A. Yes.

* * * *

[fol. 90] CROSS-EXAMINATION

BY MR. HAMOVIT:

Q. Mrs. Zacks, you and your husband first went into business back in 1945, didn't you?

A. I went into business myself, and my husband was involved in—he was employed somewhere else.

Q. I see. And what was that business back in 1945?

A. In 1945, actually I did this on my own, and it wasn't too much of a business. I had someone manufacture my invention.

Q. What was your product?

A. It was a wired shoulder pad, snap-on shoulder pad.

Q. Similar to any of these items that we've referred to?

[fol. 91] A. Yes.

Q. As Exhibits 4, 6 and 7?

A. Yes.

Q. Which one was it?

A. It was this one right here. (Indicating.)

Q. Would you tell me the number in the lower right-hand corner on the first page?

A. Yes, if I can read it, it says "No. 4," I think, doesn't it?

Q. That's the item that you referred to as Barry Foam or Barry Bone?

A. At that time it was not called—no, not Barry Foam, Lady Barry.

Q. Lady Barry?

A. But at that time it was not called that.

Q. I see. But it was substantially the same product?

A. Yes.

Q. And then later you started making other products, I assume?

A. Not me, no.

Q. But the business that you and subsequently your husband got into, called Shoulda-Shams, I believe?

A. Well, Shoulda-Shams is the same item.

Q. Lady Barry?

[fol. 92] A. Yes. There is a long story involved with the change of name, and I don't think it has any bearing on this case.

Q. Well, let's hear the story.

A. Well, originally the shoulder pad was called "Shoulda-Molder," and there was a company in New York who had a shoulder—was in the shoulder pad business and had a similar name, and so they requested that we change the name, and we did.

Q. And when did your husband decide to go into business with you?

A. Well, let me see now. You see, my husband worked with me only part time to begin with, and I can't tell you the exact period of time that it was, because I really don't remember. It wasn't until after this company was formed that my husband devoted full time to the business, and then I became sort of a—that's when I got into the invention business. I mean, as far as our contracts and everything were concerned. And this company was formed, and Mr. Streim eventually became a partner in the business.

* * * *

[fol. 93] Q. So that was really what you were patenting, the foam rubber sole and the elastic grip?

A. That's right.

MR. CRAMPTON: I would like to note an objection. I think the Patent speaks for itself on what was patented.

THE WITNESS: I haven't gone over this for many years.

Q. That was your idea?

A. That was my understanding. Now, as to the claims, I haven't gone over in years. Now, I have many patents, and I possibly could have overlooked the specific claims.

* * * *

[fol. 94] Q. I see. Since 1948 have you engaged in business?

[fol. 95] A. I have been an inventor, that's all.

Q. You have developed these products. That's what you mean?

A. Yes.

Q. The products that are manufactured either under the name of Angel Treads or Barry Foam or Barry Bone or Lady Barry, or the products that H. B. Kleinert—

A. Well, actually I have developed many more products than these.

Q. Would you tell us what they are?

A. Well, I can tell you some of them.

Q. Please do.

A. I have developed a lot of other products that you haven't mentioned. I have developed the cover for playpen pad, for instance.

Q. Is that manufactured?

A. No, it's not being manufactured.

Q. Is it patented?

A. Yes.

Q. Has it ever been manufactured?

A. Yes, it has been manufactured.

Q. In quantities?

A. I would say on a test basis.

Q. It proved unsuccessful on test?

A. Well, it proved unsuccessful at that particular time. [fol. 96] It could be that if another manufacturer, one that was engaged in the infant wear business, were in it, they might. And there is a similar product now on the market. It doesn't have my patented features, but it is a similar product.

Q. Did you ever discuss with any other manufacturers the handling of this product?

A. I discussed it with a—some of the buyers in the infant wear departments. I still hope some day that I will get someone to—I just ~~simply~~ haven't had the time to do it, but I do hope some day that some infants wear manufacturer will take on this item and produce it.

Q. What other products do you have, Mrs. Zacks?

A. I have a patent on a certain chair cushion that has a patented feature. I have a patent—

Q. Is it manufactured?

A. It is not.

Q. Has it ever been?

A. Yes.

Q. By whom?

A. By the R. G. Barry Corporation.

Q. In quantity?

A. Well, that's hard to say whether you would think it was in quantity or not. I don't recall the amount of volume business that was done on it, but the company [fol. 97] decided that the item was too high priced at that time, and that they would discontinue it, and that perhaps at some future time they could bring it out with cheaper materials for a cheaper price. But at that time the company decided to discontinue it.

Q. Any other items?

A. Yes. I had a little cotton turban that I had a patent on. There was some others that I just don't recall right now.

Q. Do you think it's at all fair to say, Mrs. Zacks, that you could be termed a designer?

A. Well, that's a matter of interpretation on how you mean it. I think you would have to be a little more specific. I could be a designer, possibly, maybe I have the capabilities. This would depend on the people who wanted to hire me as a designer, I don't know.

Q. You never worked, I suppose, with machinery?

A. No.

Q. Your activities have been devoted to the sort of product that can be handled with fabrics and a sewing machine?

A. Yes. And, of course, the reason for that, I say, my experience and my background is department store oriented.

Q. I see. Do you have any other products other than those you have already named?

[fol. 98] A. I have had ideas that I've worked on in lots of different fields. I thought one time about—there was some wire products that I thought about that was entirely afield from the notions department. Also then there was another item that—I can't remember all the e patents have and all the products I developed, but I have done work on other items that were not in the department store area, too.

Q. Have you gotten any other patents?

A. No.

* * * *

[fol. 99] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

AARON ZACKS, ET AL, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

WASHINGTON, D. C.
TUESDAY, October 10, 1961
at 10:00 o'clock a.m.

TESTIMONY FOR PLAINTIFF

• • • •

[fol. 100] THE WITNESS: My name is Florence Zacks, 140 North Parkview Avenue, Columbus, Ohio.

DIRECT EXAMINATION

BY MR. CRAMPTON:

Q. What is your occupation, Mrs. Zacks?
A. I am a creator of products.
[fol. 101] Q. Do you have a number of patents?
A. Yes, I do.
Q. How many would you say?
A. I am not sure. Maybe about fourteen, I think. I think I would have to call on records for the exact number, but I think I own about fourteen patents.
Q. You have some patents, some patent applications pending?
A. Yes, I do.
Q. About how many?
A. Right now I have one.

• • • •

[fol. 102]

SUPREME COURT OF THE UNITED STATES

No. ...., October Term, 1962

UNITED STATES, PETITIONER

vs.

AARON ZACKS AND FLORENCE ZACKS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—October 4, 1962

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 3rd, 1962.

/s/ Earl Warren
Chief Justice of the United States.

Dated this 4th day of October, 1962.

[fol. 103]

SUPREME COURT OF THE UNITED STATES

No. 632 ...., October Term, 1962

UNITED STATES, PETITIONER

vs.

AARON ZACKS, ET AL.

ORDER ALLOWING CERTIORARI—January 14, 1963

The petition herein for a writ of certiorari to the United States Court of Claims is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1963 678428 971

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CITATIONS

667843—62——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

AARON ZACKS AND FLORENCE ZACKS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (Appendix B, *infra,* pp. 22–26) is reported at 280 F. 2d 829.

JURISDICTION

The judgment of the Court of Claims was entered on July 6, 1962. (Appendix B., *infra,* p. 27.) On October 4, 1962, by order of the Chief Justice, the time within which to file a petition for a writ of certiorari was extended to and including December 3, 1962. The jurisdiction of the Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a retroactive tax relief measure applicable to years otherwise barred by the statute of limitations must be deemed by implication to reopen the limitations period even though it does not expressly so provide.

STATUTES INVOLVED

Section 1 of the Act of June 29, 1956, c. 464, 70 Stat. 404, Section 322(b)(1) of the Internal Revenue Code of 1939, and Section 7422(a) of the Internal Revenue Code of 1954, are set forth in Appendix A, *infra*, pp. 19–21.

STATEMENT

1. Section 117(q) of the Internal Revenue Code of 1939, enacted June 29, 1956 (by Section 1 of P.L. 629, c. 464, 70 Stat. 404) provided that a transfer of all substantial rights to a patent by any individual whose efforts created such property shall be treated as the sale or exchange of a capital asset held for more than six months, whether or not the consideration is received in the form of royalties. (Appendix A, *infra*, p. 19). Although the substantive meaning and application of Section 117(q) are not at issue here, a brief summary of its background is necessary to an understanding of the case.

In 1946, the Commissioner announced his acquiescence in *Edward C. Myers*, 6 T.C. 258, a Tax Court decision holding that the granting of an exclusive license of all rights under a patent constituted the sale or exchange of a capital asset. 1946–1 Cum. Bull. 3. Later, on March 20, 1950, he withdrew the acquiescence, substituted a nonacquiescence, and announced that he would not accord capital gains treatment to

royalties under such a license in tax years beginning after May 31, 1950. Mim. 6490, 1950-1 Cum. Bull. 9. Despite the nearly unanimous rejection of this position by the courts, the Commissioner strenuously adhered to it in the years that followed. Congress ultimately resolved the problem prospectively in Section 1235 of the 1954 Code, which provided, for 1954 and subsequent years, that an inventor or "holder" of a patent might obtain capital gains treatment upon the transfer of all substantial rights under the patent, even though payment was in the form of royalties. Thereupon, the Commissioner issued another ruling, Rev. Rul. 58, 1955-1 Cum. Bull. 97, announcing that he would continue to apply his 1950 ruling to payments received in taxable years beginning after May 31, 1950, and before January 1, 1954, the period not covered by Section 1235. To settle the controversy for that period, Congress in 1956 retroactively amended the 1939 Code by adding Section 117(q), which in substance made applicable to taxable years beginning after May 31, 1950, the rule established for later years by the 1954 Code. See *Coplon* v. *Commissioner*, 28 T.C. 1189, 1191; H. Rep. No. 1607, 84th Cong., 1st Sess., pp. 1-2 (1956-2 Cum. Bull. 1226); S. Rep. No. 1941, 84th Cong., 2d Sess., pp. 4-5 (1956-2 Cum. Bull. 1227, 1229-1230); H. Conf. Rep. No. 2253, 84th Cong., 2d Sess., p. 5 (1956-2 Cum. Bull. 1234, 1236). See also S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 438-441 (3 U.S.C. Cong. and Adm. News (1954) 4621, 5081-5084), accompanying the passage of Section 1235 of the 1954 Code.

2. In 1952, Florence Zacks received royalties from a manufacturing corporation to which she had trans-

ferred all substantial rights under patents granted on certain clothing items she had originated. These royalties, amounting to about $37,000, were reported as ordinary income in the 1952 joint income tax return filed by Mrs. Zacks and her husband, Aaron Zacks ("taxpayers") on April 15, 1953. (R. 1-2, 6.) The last payment of 1952 income tax was made on or before September 28, 1953. (R. 2, 7.) The statute of limitations normally applicable to a claim for refund of the taxpayers' 1952 taxes would accordingly have expired on April 15, 1956, three years from the date the return was filed (Section 322(b)(1), Internal Revenue Code of 1939).

On June 23, 1958, taxpayers filed a claim for refund of 1952 income tax on the ground that the aforesaid royalties were taxable under Section 117(q) as long-term capital gain rather than ordinary income. On March 5, 1959, no action having been taken on their claim, they filed a petition in the Court of Claims on the same ground, seeking a refund of $10,636.06 plus interest. (R. 1-4.)

In its answer the United States asserted as one of its defenses that the Court of Claims had no jurisdiction over the refund suit because the claim for refund had not been filed within three years of the filing of the return or within two years of the payment of the tax, as required by Section 322(b)(1) of the Internal Revenue Code of 1939 (Appendix A, *infra*, p. 20), and that the suit was therefore barred by Section 7422(a) of the Internal Revenue Code of 1954 (Appendix A, *infra*, pp. 20-21). (R. 7-8.)

Taxpayers filed a motion (R. 9) to strike the defense of the statute of limitations, and, on July 15, 1960, the Court of Claims issued a decision granting the motion and returning the case to the trial commissioner for further proceedings (Appendix B, *infra*, pp. 22–26). (R. 7–8.)

There followed a trial on the merits. Although a portion of the royalties in question admittedly qualified for long-term capital-gain treatment under Section 117(q), the parties were in dispute as to the extent to which the balance constituted consideration for the transfer of the patent rights or compensation for Mrs. Zacks' services as a designer. After the trial was concluded, but before the filing of the trial commissioner's report, the factual dispute was compromised by a stipulation between the parties that $15,035.98 of the 1952 royalities were received in exchange for the transfer of the patent rights. The stipulation, which also resolved the remaining minor issues in the case, fixed the amount of taxpayers' recovery at $4,624.09, plus interest (assuming that the refund claim was timely), but expressly reserved to the United States the right to seek review in this Court of the timeliness of the taxpayers' claim for refund and subsequent suit. (Appendix B, *infra*, pp. 29–30.) On July 6, 1962, the Court of Claims entered judgment on the stipulation, reciting that "plaintiffs agreed to accept the sum of $4,624.09, with interest thereon as allowed by law, in full settlement of all claims set forth in the petition, without prejudice, however, to defendant's right to file a petition

for certiorari in the Supreme Court to review the question whether plaintiffs' claim for refund and suit herein were timely filed, and the defendant consented to the entry of judgment in that amount and upon such condition." (Appendix B, *infra*, p. 27.)

In holding that the refund claim was timely, the Court of Claims ruled that enactment of Section 117(q) created a new cause of action and therefore a new period of limitations. It reasoned that "at least insofar as taxable years barred by the statute of limitations are concerned, Congress intended by the passage of Public Law 629 to give taxpayers a right which they did not have before its passage," and that, had Congress not so intended, "it was an idle gesture to have made [Public Law 629] applicable to years as far back as 1950." (Appendix B, *infra*, p. 25.)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Claims in this case is in conflict with the decisions of the Fifth Circuit in *Tobin* v. *United States*, 264 F. 2d 845,[1] and the Sixth Circuit, *per curiam*, in *United States* v. *Dempster*, 265 F. 2d 666, certiorari denied, 361 U.S. 819.[2] All of these cases involved the same issue, *i.e.*, whether refund claims grounded on Section 117(q)

[1] The Fifth Circuit recently adhered to this decision in *Tobin* v. *Tomlinson*, No. 19173 (Nov. 21, 1962), which involved a subsequent refund claim by the same taxpayer.

[2] The decision in *Zacks* is also in conflict with *Vaughn* v. *United States*, 181 F. Supp. 386 (S.D. Cal. 1959). A result similar to *Zacks* was reached by the Second Circuit in *Hollander* v. *United States*, 248 F. 2d 247, on a similar rationale;

and filed after the running of the statute of limitations were timely. *Tobin* and *Dempster* held that the enactment of Section 117(q) did not by implication extend the ordinary limitations period; *Zacks* held that it did. The opinion of the Fifth Circuit in the *Tobin* case (upon which the Sixth Circuit exclusively relied in *Dempster*) is printed in Appendix C to this brief, pp. 31–35, *infra*.

The conflict over the limitations consequences of Section 117(q) does not, as might at first sight appear, turn merely upon a disagreement over what the substantive tax law was prior to its enactment—a disagreement which, though still a conflict, would be of considerably less current importance. While Section 117(q) was characterized by the Court of Claims as having created a new right and by the Fifth Circuit as having merely confirmed the prior case law, the two courts in fact fully agree on the state of the prior law and the substantive effect of Section 117 (q). Specifically, they agree that the decided cases were nearly unanimous in allowing capital gains treatment; that the Commissioner had stubbornly (to use the Court of Claims' characterization) and arbitrarily (to use the Fifth Circuit's) refused to follow the

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but see Judge Clark's vigorous dissenting opinion (pp. 253–256). Both *Hollander* and *Zacks* are contrary in approach to earlier decisions involving the retroactive relief accorded by Congress in 1942 in connection with deductibility of non-trade or non-business expenses, which had limited the relief accorded to that expressly provided by the statute. See *White's Will* v. *Commissioner*, 142 F. 2d 746 (C.A. 3d, 1944); *Merrill* v. *United States*, 152 F. 2d 74 (C.A. 2d 1945); *Ross* v. *United States*, 75 F. Supp. 725 (C. Cls., 1948), certiorari denied, 334 U.S. 832.

court decisions and was still maintaining a contrary position; and that the purpose of Section 117(q) was to settle the controversy once and for all by expressly rejecting the Commissioner's view.[3] What they disagree about is rather the question of statute-of-limitations law: Does a statute which retroactively resolves a live controversy over the tax treatment of an item operate to reopen the statute of limitations? The Fifth and Sixth Circuits answered that question "No" and the court below answered it "Yes"; it is there that the conflict lies.

2. Sections 322(b)(1) of the Revenue Code of 1939 and 7422(a) of the Revenue Code of 1954 (Appendix A, *infra*, pp. 20-21), provide that tax refund claims must be made within three years from the time the return is filed or two years from the time the tax is paid, whichever period expires later. Despite these express provisions, the court below held that in the case of retroactive tax relief statutes, Congress, although

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[3] Thus, the Fifth Circuit in *Tobin* held that Section 117(q) "did not create the right" but "merely came to the aid of the taxpayer in rejecting as unwarranted and bringing under statutory control the commissioner's vacillating and arbitrary action in now accepting and now rejecting in regard to patents the view announced in the cases" (Appendix C, *infra*, p. 34). Similarly, the Court of Claims in *Zacks* explained that "in view of the stubborn persistence of the Bureau in its interpretation of the law, and of its refusal to follow the decisions of this court and of three of the Circuit Courts of Appeals and of the Tax Court, Congress felt it necessary to pass an Act to set aside the law as interpreted by the Bureau * * *" (Appendix B, *infra*, p. 24). And, although declaring that Section 117(q) gave the taxpayer a right he had not previously had, the court below immediately added the explanation that "[a]t least, it gave him a right which the agency charged with the administration of the prior law said he did not have." (Appendix B, *infra*, p. 25.)

not saying so, must be deemed to have intended that the limitations period should commence to run, not with the filing of the return or the payment of the tax, but with the passage of the statute. This conclusion is wholly unwarranted.

(a) A survey of retroactive tax legislation enacted in recent years convincingly demonstrates that when Congress wished to extend the statute of limitations it did so in express terms. For the period 1956 to 1962, we have found at least 36 such measures (in addition to Section 117(q)) applicable to years that would ordinarily be barred of which 24 expressly dealt with the limitations problem, and 12 did not.[4] Nine (including Section 2 of the very same Act which added Section 117(q) to the 1939 Code) provided for an additional period of either six months or one year from date of enactment for filing refund claims, and of those nine all but two prohibited the payment of any interest on refunds (and all but one specified that years settled by closing agreement or compromise were not reopened). (Category I.)[5] One measure, also prohibiting payment of interest, did not extend the limitations period commencing with its enactment, but substituted a longer period (measured from the date of filing of the return) for that provided under Section 322(b)(1). (Category II.)

[4] See Appendix D, *infra*, pp. 36–43. In making this count, we have excluded measures such as Sections 21, 22, 31, 34, 44, 45, 51, 53 and 59 of the Technical Amendments Act of 1958, P.L. 85–866, 72 Stat. 1606, which, although effective beginning in 1954, do not appear, at least at first blush, to be retroactive tax relief measures.

[5] The statutes falling into Categories I through V are summarized in Appendix D, *infra*, pp. 36–43.

We know of five measures enacted during this time which extended the statutory period, but made no substantive change in the law. (Category III.) In addition, at least ten measures gave the taxpayer the benefit of an election affecting prior years. (Category IV.) Of these, five were specifically applicable only to open years (or years open as of a specific date); two specifically extended the period of limitations for closed years; two provided for the "tolling" of the statute; and one was silent on the limitations question. We have found eleven retroactive measures (in addition to Section 117(q) and the elective measure just mentioned) which were silent as to any extension of time for claiming refunds (all but four of which prohibited the payment of interest.) (Category V.)

As this brief summary makes clear, Congress has dealt with the limitations problem and related questions in a variety of ways—sometimes extending the existing period, sometimes tolling it, and, in many other cases, setting in motion a fresh period of one year or less commencing with the date of enactment. In light of this pattern of discriminating solutions, it seems particularly inappropriate for a court, substituting its judgment for that of Congress, to conclude that a statute which is silent on the matter must be deemed to create by implication an additional period of at least two years [*] for filing claims. If that interpretation were sound, then those provisions which

[*] In subsequent cases, the Court of Claims made it clear that the applicable limitations period (computed from the date of enactment) was to be the two-year period referred to in Section 322(b)(1), on the ground that the retroactive statute gave rise to a constructive overpayment of tax as of the date of its enactment. *Eastman Kodak Co.* v. *United States*, 292 F. 2d

specifically give the taxpayer an additional grace period of one year or less would actually operate to shorten the time that would otherwise be available for claiming a refund, and taxpayers for whom Congress made no provision for extending the statute would be treated more favorably than those for whom such provision was expressly made. We submit that a statutory construction which produces this anomalous result is wholly unacceptable.

(b) The decision below rested, in part, on the view that unless Congress intended to reopen the statute of limitations, it was an "idle gesture" to have made Section 117(q) applicable to ordinarily barred years. This reasoning, however, misconceives the character of retroactive tax relief legislation. Much of this legislation is enacted at the urging of taxpayers whose claims for refund are already pending before the Internal Revenue Service or the courts, or at least whose years are still open. In such cases, the primary purpose of the statute is often to benefit these partic-

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901, 904–905; *Lorenz* v. *United States*, 296 F. 2d 746. In an unreported decision filed July 2, 1962 (*Walter* v. *United States*, C. Cls. No. 160–61), the court dismissed as untimely a claim filed more than two years after the enactment of Section 117(q). Following this decision, four similar cases pending in the Court of Claims were dismissed either by order or stipulation. *Alfandre* v. *United States*, C. Cls. No. 209–62 (stipulation dated September 28, 1962); *Church* v. *United States*, C. Cls. No. 205–62 (order dated October 22, 1962); *Carter* v. *United States*, C. Cls. No. 469–60 (order dated October 22, 1962); *Puschelberg* v. *United States*, C. Cls. No. 101–60 (order dated November 2, 1962). Similarly, in *Smith* v. *United States*, 304 F. 2d 267, now pending on taxpayer's petition for certiorari, the Third Circuit held that even assuming that Section 117(q) created a new period of limitations, a claim filed more than two years after enactment was untimely.

ular taxpayers or to settle existing controversies and obviate the need for litigation, rather than to establish a rule of general application.[7] In effect, such statutes perform much the same function as a decision by this Court, which resolves the dispute between the parties before it but affords no benefit whatever to similarly situated persons whose right to sue has lapsed. *Cf. Kavanagh* v. *Noble,* 332 U.S. 535, rehearing denied, 333 U.S. 850.

As already noted, *supra,* pp. 2–3, 7–8, the issue resolved by Section 117(q)—whether royalties received from the transfer of all substantial rights to a patent are entitled to capital gain treatment—was hotly in dispute at the time of its enactment. A statement on the floor of Congress by the chairman of the House committee which reported the bill strongly suggests that its purpose was to eliminate the necessity for litigation by those taxpayers "still confronted with litigation for taxable years falling in this period in order to secure the rights to which the courts, with practical unanimity, have held they are entitled."[8] Certainly the bill had

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[7] For a discussion of practical considerations which may enter into the enactment of legislation of this type, see Surrey, *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted*, 70 Harv. L. Rev. 1145 (1957).

[8] The entire statement by Chairman Cooper of the House Ways and Means Committee of the 84th Congress (101 Cong. Rec., Part 10, pp. 12708–12709) is as follows:

"Mr. COOPER. Mr. Speaker, prior to the enactment of the Internal Revenue Code of 1954, there was no statutory provision dealing specifically with the sale or exchange of patents, and the position of the Internal Revenue Service regarding the sale of patents was in opposition to the position taken by the courts. Because of this conflict, taxpayers were burdened with the necessity of litigation in order to obtain the

this effect, for a substantial number of cases pending before the courts and the Internal Revenue Service at the time Section 117(q) was enacted were subsequently settled by the payment of a full refund or the dismissal of a government appeal.[9] Plainly, a

capital-gains treatment to which the court decisions held they were entitled. To remove the necessity of this litigation, Congress enacted section 1235 of the 1954 Code which provides that the sale or exchange of all substantial rights to a patent is to be considered as a sale or exchange of a capital asset held for more than 6 months whether or not payments are to be made periodically during the period of the transferee's use of the patent and regardless of whether the payments are contingent on the productivity, use, or disposition of the patent.

"The relief provided by section 1235 is available only with respect to amounts received in any taxable year to which the 1954 Code applies. As the result of this and the announced policy of the Internal Revenue Service to continue its insistence on its position for years beginning after May 31, 1950, and prior to effective date of the 1954 Code *taxpayers are still confronted with litigation for taxable years falling in this period in order to secure the rights to which the courts, with practical unanimity, have held they are entitled.*

"*H.R. 6143 eliminates the necessity for such litigation by making the provisions of the 1954 Code available to years beginning after May 31, 1950.*

"This bill was reported unanimously by the Committee on Ways and Means." [Emphasis supplied.]

[9] Among the cases pending when Section 117(q) was enacted which were subsequently settled by the Justice Department on the basis of that enactment by the making of a full refund, are the following: *Goff v. United States*, C. Cls. No. 232-56, years 1951, 1952, 1953, 1954; *Ozai-Durrani v. United States*, C. Cls. No. 125-57, years 1951, 1952, 1953; *A. M. Hunt v. United States*, N.D. Ohio, No. 33687, years 1951, 1952; *J. P. Hunt v. United States*, N.D. Ohio, No. 33688, years 1951, 1952; *J. H. Hunt v. United States*, N.D. Ohio, No. 33689, years 1951, 1952; *G. L. Hunt v. United States*, N.D. Ohio, No. 33690, years 1951, 1952; *C. F. Hunt v. United States*, N.D. Ohio, No. 33691,

statute which achieves this result cannot be considered an "idle gesture" merely because it does not also reopen barred years.

3. The decision below has important and far-reaching implications. As we have pointed out, the Court of Claims reopened the statute of limitations here even though the right conferred upon the taxpayer had been recognized by the overwhelming weight of prior case authority and contested only by the Commissioner.[10] The necessary consequence of the

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years 1951, 1952; *Hathaway* v. *United States*, C. Cls. No. 342-55, year 1951; *Hassler* v. *United States*, N.D. Calif., No. 7359, years 1951, 1952, 1953; *Garraway* v. *Manning & Lambert*, N.J., No. 849-55, years 1951, 1952; *Dalton* v. *United States*, C. Cls. No. 295-56, year 1951; *Briskman* v. *United States*, S.D. N.Y., No. 103-290, years 1951, 1952; *Cline* v. *United States*, S.D. Calif., No. 10-58-T, year 1951; *Schlenz* v. *United States*, N.D. Ill., No. 57-C-264, year 1951. Government appeals pending in the following cases, among others, were dismissed. *King* v. *United States*, S.D. Texas, No. 8316, years 1950, 1951; *Beeth* v. *United States*, S.D. Texas, No. 8399, years 1950, 1951, 1952; *Waterson* v. *United States*, N.D. Texas, No. 308, years 1951, 1952, 1953; *Commissioner* v. *Hudson*, T.C. No. 58726, years 1951, 1952. While we do not know the number of refund claims pending before the Internal Revenue Service at that time which were allowed by the Service on the basis of Section 117(q), we believe the number to have been considerable.

[10] In certain respects not pertinent to this case, Section 117(q) did effect a change in prior law. This section was patterned on Section 1235 of the 1954 Code, and, like that provision, (a) removed the distinction between professional inventors (not previously entitled to capital gain treatment because to them a patent did not constitute a capital asset) and amateur inventors, to whom the courts had accorded capital gain treatment, and (b) eliminated the requirement of a six-month holding period. In *Lorenz* v. *United States*, 296 F. 2d 746, the Court of Claims held that, as to a professional inventor even more certainly than as to an amateur, Section 117(q) created a new period of limitations. But, looking at the legislative history of

decision, therefore, is that every retroactive tax relief measure, other than one which merely restates undisputed prior law, must be deemed to set in motion, *sub silentio,* a new limitation period commencing on the date of its enactment. The rationale of this holding (and of *Verckler* v. *United States,* 170 F. Supp. 802, where the Court of Claims reached a similar result in construing a different retroactive tax relief measure)—*i.e.,* that the limitations period must be computed from the date of enactment of the statute—has become settled doctrine in the Court of Claims, which subsequently applied the principle in *Lorenz* v. *United States,* 296 F. 2d 746, *supra,* fn. 10, and, by analogy, in *Eastman Kodak Co.* v. *United States,* 292 F. 2d 901.[11] If allowed to stand, this erroneous doctrine will critically affect not only the relatively few pend-

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Section 117(q), it seems fair to state that the primary purpose of Section 117(q) was to confirm to the amateur inventor, without the necessity of litigation, the benefits to which the courts had held him to be entitled, and that the liberalization of the law with respect to professional inventors and holding period resulted incidentally from the fact that Section 117(q) was patterned after Section 1235.

[11] This case involved the question whether a suit for refund of excise taxes because of a readjustment of the sales price occurring after the taxes were paid had to be preceded by the filing of a claim for refund of taxes "erroneously or illegally assessed or collected." The Court of Claims held that it did, reasoning on the basis of what it referred to as the "*Verckler-Zacks* doctrine" and the "*Verckler-Zacks* principle," that taxes become "erroneously or illegally assessed or collected" on the date of the subsequent occurrence making them so, whether this subsequent occurrence be a readjustment of the sales price or a retroactive tax relief measure (292 F. 2d at 905–907).

ing cases under Section 117(q) itself,[12] but also claims pending under other retroactive statutes and involving millions of dollars of revenue, to say nothing of claims that will arise in future under this frequently-adopted type of legislation.

As we have shown, *supra*, pp. 9–10, Congress enacted at least 36 retroactive tax measures in the period 1956–62 (in addition to Section 117(q)), of which twelve made no provision for extending the limitations period. Under one of these twelve measures, the Retirement-Straight Line Adjustment Act of 1958,[13] we have been informed by the Internal Revenue Service that the otherwise barred claims of three taxpayers alone involve an aggregate of over nineteen million dollars[14] and that there may be other pending claims as well.

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[12] These cases are *Hobbs* v. *United States*, C. Cls. No. 144–61; *Wilson* v. *United States*, C. Cls. No. 367–61; *Turenne* v. *United States*, C. Cls. No. 96–62; *Fenn* v. *United States*, C. Cls. No. 259–61; *Vogt* v. *United States*, C. Cls. No. 154–62; and *Lorenz* v. *United States*, C. Cls. No. 277–59. On motion for summary judgment *Lorenz* was decided adversely to the Government on the limitations issue on December 6, 1961 (296 F. 2d 746) and that case is still pending before the Court of Claims on the merits. In addition, suits have recently been instituted in the Court of Claims by Aaron and Florence Zacks for the year 1951 (C. Cls. No. 340–62), and by their son, Gordon Zacks for the year 1953 (C. Cls. No. 341–62), which appear to present the same issue as is involved in this case.

[13] P.L. 85–866, 72 Stat. 1606, 1669 (Section 94 of the Technical Amendments Act of 1958).

[14] The claim of the *New York, Chicago and St. Louis Railroad Co.* now pending before the Court of Claims (C. Cls. No. 385–61) is for $1,591,089.46 for the years 1943 and 1944. Although disputed by the government, taxpayer in the cited case relies upon the *Verckler-Zacks* doctrine as dispositive. (The government contends that the governing statute repre-

The importance of the *Zacks* decision and the urgency that it be reviewed by this Court are magnified by the fact that it issues from a court which has nationwide jurisdiction (under 28 U.S.C. 1491). Since the Court of Claims is available to all taxpayers, it may be expected that most future litigation arising under retroactive tax provisions and involving refund claims which would be barred by the normal statutes of limitations will hereafter be brought exclusively in that forum, so that the courts of appeals will have little further opportunity to pass upon the issue.[15] Thus, if the instant petition for certiorari is denied, it is entirely likely that the erroneous doctrine announced by the decision below—though in direct conflict with the decisions of two courts of appeals—will become, for most purposes, the final word on this subject.

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sents approval merely of a compromise with certain railroads that had filed timely claims.) We have been advised that similar claims filed by the Pennsylvania Railroad Company (for the year 1943) for $17,039,655.60 and by the Baltimore and Ohio Railroad Company (also for the year 1943) for $604,612.49 are pending before the Internal Revenue Service.

[15] There are no pending cases involving this question in the district courts or, so far as we know, in the Tax Court, whereas 13 such cases (in addition to *Zacks*) are either pending before or have been decided by the Court of Claims. See fn. 6, *supra*, pp. 10–11, and fn. 12, p. 16. The taxpayers in *Lorenz* (see fn. 10, *supra*, p. 14), who had originally filed suit in the District Court for the Southern District of Florida (Civ. No. 8356–M), dismissed that suit without prejudice after the Fifth Circuit's decision in *Tobin*, and reestablished it in the Court of Claims. Similarly, the taxpayers in *Puschelberg* (see fn. 6, *supra*, p. 11), having originally filed suit in the District Court for the Eastern District of Michigan (No. 18918), dismissed that suit without prejudice after the Sixth Circuit's decision in *Dempster*, and reinstituted it in the Court of Claims.

CONCLUSION

There is a direct conflict of decisions which requires resolution by this Court. The issue is one concerning basic principles and of great importance in the administration of the tax law. The petition for certiorari should accordingly be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

I. HENRY KUTZ,
MILDRED L. SEIDMAN,
DAVID I. GRANGER,
Attorneys.

DECEMBER 1962.

APPENDIX A

Act of June 29, 1956, c. 464, 70 Stat. 404:

[Sec. 1.] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 117 of the Internal Revenue Code of 1939 (relating to capital gains and losses) is hereby amended by adding at the end thereof a new subsection as follows:

(q) Transfer of Patent Rights.—

(1) General Rule.—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are—

(A) payable periodically over a period generally coterminous with the transferee's use of the patent, or

(B) contingent on the productivity, use, or disposition of the property transferred.

(2) "Holder" Defined.—For purposes of this subsection, the term "holder" means—

(A) any individual whose efforts created such property, or

(B) any other individual who has acquired his interest in such property in exchange for consideration in money or money's worth paid to such creator prior to actual reduction to practice of the invention covered by the patent, if such individual is neither—

(i) the employer of such creator, nor

(ii) related to such creator (within the meaning of paragraph (3)).

(3) Exceptions.—This subsection shall not apply to any transfer described in paragraph (1)—

(A) by a nonresident alien individual, or

(B) between an individual and any related person.

For purposes of this paragraph, the term "related person" means a person, other than a brother or sister (whether of the whole or half blood), with respect to whom a loss resulting from the transfer would be disallowed under section 24(b).

(4) Applicability.—This subsection shall apply with respect to any amount received, or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred.

Internal Revenue Code of 1939:

Sec. 322. Refunds and Credits.

* * * * *

(b) *Limitation on allowance*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(26 U.S.C. 1952 ed., Sec. 322.)

Internal Revenue Code of 1954:

Sec. 7422. Civil Actions For Refund.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be main-

tained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * * *

(26 U.S.C. 1958 ed., Sec. 7422.)

APPENDIX B

In the United States Court of Claims

No. 104-59

(Decided July 15, 1960)

AARON ZACKS AND FLORENCE ZACKS

v.

THE UNITED STATES

ON PLAINTIFFS' MOTION TO STRIKE DEFENDANT'S SECOND DEFENSE AND DEFENDANT'S MOTION TO DISMISS PETITION

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs sue for the recovery of an overpayment of income taxes by reason of having reported royalties received from patents as ordinary income. They allege that the amount paid was correctly computed according to the law, as interpreted by the rulings of the Internal Revenue Bureau, at the time it was paid, but that later Congress amended the Internal Revenue Code retroactively so as to provide that the amount received as royalties should be returned as capital gains rather than as ordinary income, which resulted in an overpayment.

The defendant interposes the defense that no claim for refund of the amount of the overpayment was filed within the statutory period. Plaintiffs reply that the amendment of the Internal Revenue Code, referred to above, created a new cause of action, and that the statute of limitations did not begin to run until after its passage.

The Act upon which plaintiffs rely is Public Law 629, passed on June 29, 1956 (70 Stat. 404). It added section 117(q) to the Internal Revenue Code of 1939. This section reads:

> (q) *Transfer of Patent Rights.*—
>
> (1) *General Rule.*—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are—
>
> (A) payable periodically over a period generally coterminous with the transferee's use of the patent.
>
> (B) contingent on the productivity, use, or disposition of the property transferred.
>
> * * * * * *
>
> (4) *Applicability.*—This subsection shall apply with respect to any amount received, or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred. [Added by § 1 of the Act of June 29, 1956, c. 464, 70 Stat. 404]

The taxable year in question is 1952; thus, section 117(q) applies to this taxable year, and if it created a new cause of action, plaintiffs' suit is in time, having been filed just a few days less than two years from the passage of the Act.

Plaintiffs' petition alleges that the law in effect prior to the passage of the Act of June 29, 1956, was construed by the Internal Revenue Bureau to require a taxpayer to report patent royalties as ordinary income. The defendant admits this in its answer. For

the rulings of the Bureau see Mim. 6490, 1950–1 Cum. Bull. 9; Revenue Ruling 55–58, 1955–1 Cum. Bull. 97.

However, at the time of the passage of P.L. 629, *supra*, there were a number of court decisions to the contrary: *Myers* v. *Commissioner*, 6 T.C. 258; *Kronner* v. *United States*, 126 Ct. Cl. 156; *United States* v. *Carruthers*, 219 F. 2d 21 (C.A. 9th); *Commissioner* v. *Celanese Corp.*, 140 F. 2d 339 (C.A.D.C.); and *Commissioner* v. *Hopkinson*, 126 F. 2d 406 (C.A. 2d). But, notwithstanding these court decisions, the Bureau of Internal Revenue persisted in its interpretation and continued to require taxpayers to report such income as ordinary income.

It is well settled law, needing no citation of authority, that a taxpayer is bound to follow the interpretations of the law by the agency charged with its administration. This being true, plaintiffs had no option other than to report the income from patent royalties as they did report them. If plaintiffs believed that the interpretation of the law was incorrect, they were of course entitled to file a claim for refund and undertake to convince the Bureau of Internal Revenue of its error, and, in default thereof, they were entitled to bring suit to test the matter in the courts, as other taxpayers had done. The plaintiffs instead, no doubt influenced by the failure of other taxpayers to secure a reversal of the Bureau's rulings, did not question the correctness of what the governmental agency in charge of the enforcement of the law had ruled, but acquiesced in it, and paid their taxes accordingly.

Then, in view of the stubborn persistence of the Bureau in its interpretation of the law, and of its refusal to follow the decisions of this court and of three of the Circuit Courts of Appeals and of the Tax Court, Congress felt it necessary to pass an Act to set aside the law as interpreted by the Bureau, and

to expressly provide that income from royalties might be reported as capital gains.

We think this gave to a taxpayer a right that he had not had before. At least, it gave him a right which the agency charged with the administration of the prior law said he did not have.

Furthermore, we think Congress must have intended to give some taxpayers a right which it must have known had long since been barred by the statute of limitations. Public Law 629 was passed on June 29, 1956; it was made applicable to all taxable years beginning after May 31, 1950; Congress must have known that the statute of limitations, which requires the filing of a claim for refund within three years after the return was filed, or within two years from the time the tax was paid, had long since run as to many taxpayers with respect to several of the years to which Public Law 629 was applicable.

Defendant says Congress intended Public Law 629 to apply only to those taxpayers who had filed claims for refund within time. There is no such express limitation and there is nothing in the Act itself or in its history to indicate Congress had any such intention. The Act was made applicable to the barred years without restriction.

We cannot escape the conclusion that, at least insofar as taxable years barred by the statute of limitations are concerned, Congress intended by the passage of Public Law 629 to give taxpayers a right which they did not have before its passage. Had they not so intended, it was an idle gesture to have made it applicable to years as far back as 1950.

In *Verckler* v. *United States,* No. 361–57 Ct. Cl., decided March 4, 1959, 170 F. Supp. 802, we held that the remedial legislation involved in that case created a new cause of action and that a suit to re-

cover was not barred because a claim for refund had not been filed within three years from the time the return was filed, or within two years from the time the taxes were paid. The Second Circuit Court of Appeals in *Hollander* v. *United States*, 248 F. 2d 247, was of the same opinion. However, the Sixth Circuit Court of Appeals, in *United States* v. *Dempster*, 265 F. 2d 666, and the Fifth Circuit in *Tobin* v. *United States*, 264 F. 2d 845, were of a contrary opinion. We are convinced of the correctness of the view we take of the instant case and, therefore, notwithstanding our great respect for the Fifth and Sixth Circuit Courts of Appeals, we must decline to follow them.

It results that plaintiffs' motion to strike the defendant's second defense, raising the issue just discussed, must be granted. This defense will, therefore, be stricken. Defendant's motion to dismiss plaintiff's petition is denied.

The case is returned to the Trial Commissioner for further proceedings not inconsistent with this opinion.

It is so ordered.

DURFEE, *Judge*; LARAMORE, *Judge*; MADDEN, *Judge*; and JONES, *Chief Judge*, concur.

Judgment

In the United States Court of Claims

No. 104–59

AARON ZACKS AND FLORENCE ZACKS

v.

THE UNITED STATES

ORDER

This case comes before the court on a stipulation of the parties filed July 2, 1962, signed on behalf of the plaintiffs and the defendant by their respective attorneys, in which it is stated that a proposal was submitted by the plaintiffs and was duly accepted on behalf of the defendant, whereby plaintiffs agreed to accept the sum of $4,624.09, with interest thereon as allowed by law, in full settlement of all claims set forth in the petition, without prejudice, however, to defendant's right to file a petition for certiorari in the Supreme Court to review the question whether plaintiffs' claim for refund and suit herein were timely filed, and the defendant consented to the entry of judgment in that amount and upon such condition.

NOW, THEREFORE, IT IS ORDERED that judgment be and the same is entered for the plaintiffs in the sum of four thousand six hundred twenty-four dollars and nine cents ($4,624.09), with interest thereon as allowed by law.

MARVIN JONES,
Chief Judge.

JULY 6, 1962.

In the United States Court of Claims

No. 104–59

(Filed July 3, 1962)

AARON ZACKS AND FLORENCE ZACKS

v.

THE UNITED STATES

MEMORANDUM REPORT FOR JUDGMENT

To the Honorable the CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

The petition in the above-entitled cause was filed on March 5, 1959, to recover the sum of $10,636.06, plus interest. The claim is for the recovery of an alleged overpayment on plaintiffs' 1952 income taxes in that royalties received by them were reported as ordinary income, whereas, pursuant to Public Law 629 approved June 29, 1956, which was applicable to the year 1952, such royalties as were herein involved (i.e., paid as a result of a transfer of all substantial rights to a patent) were permitted to be reported by the inventor as long-term capital gains.

On May 4, 1959, defendant filed its answer herein in which, as a second defense, it alleged lack of jurisdiction in the court over the subject matter in that plaintiffs had not, prior to the passage of Public Law 629, filed a claim for refund of the amount of the overpayment within the statutory period and that said Public Law neither extended the time for the filing of such claims nor created a new cause of action.

On February 4, 1960, plaintiffs filed a motion to strike said second defense, and by decision of July 15, 1960, the court granted said motion and returned

the case to the trial commissioner for further proceedings.

Thereafter, a trial was had and proof was closed. However, prior to the filing of the commissioner's report, a written stipulation, signed by plaintiffs' attorney of record and by Assistant Attorney General Louis F. Oberdorfer, was filed herein, which settles all the issues in the case except the issue decided by the court. The stipulation provides as follows:

> It is hereby stipulated and agreed by and between the parties, through their respective counsel, that, pursuant to plaintiffs' proposal of December 11, 1961, as amended on June 4, 1962, accepted on behalf of defendant on June 6, 1962, the following facts may be taken as true, for the purpose of this proceeding only:
>
> 1. In their tax return filed for the calendar year 1952 plaintiffs reported \$38,604.55 as income from "Royalties." Of this amount \$15,035.98 was received in exchange for the transfer (other than by gift, inheritance or devise) of property consisting of all substantial rights to certain patents held by taxpayer Florence Zacks, whose efforts created such property. The transfer by Florence Zacks just referred to was to a corporation less than 50% of the stock of which she owned, directly or indirectly.
>
> 2. In their tax return filed for the calendar year 1952 taxpayers claimed a deduction of \$2,169.00 for "Contributions." The plaintiffs agree that this amount may be reduced to \$1,784.00.
>
> 3. In their tax return filed for the calendar year 1952 taxpayers claimed a deduction of \$306.00 for "legal fee re work on patents." Plaintiffs agree that this amount may be disallowed as a deduction.
>
> 4. Upon the basis of the facts hereinabove set forth and those admitted in the pleadings,

the parties hereto consent to the entry of judgment in favor of plaintiffs in the amount of $4,624.09 with interest thereon as allowed by law in full satisfaction of the claim alleged in the petition herein.

Nothing contained herein shall be construed to prejudice the Government's right to file a petition for certiorari in the Supreme Court to review the question whether taxpayers' claim for refund and suit in the Court of Claims were timely filed. Nothing contained herein shall be construed to affect taxpayers' tax liability for any year other than 1952.

Based on the foregoing, it is recommended that an order be entered as follows:

This case comes before the court on a stipulation of the parties filed July 2, 1962, signed on behalf of the plaintiffs and the defendant by their respective attorneys, in which it is stated that a proposal was submitted by the plaintiffs and was duly accepted on behalf of the defendant, whereby plaintiffs agreed to accept the sum of $4,624.09, with interest thereon as allowed by law, in full settlement of all claims set forth in the petition, without prejudice, however, to defendant's right to file a petition for certiorari in the Supreme Court to review the question whether plaintiffs' claim for refund and suit herein were timely filed, and the defendant consented to the entry of judgment in that amount and upon such condition.

Now, therefore, it is ordered that judgment be and the same is entered for the plaintiffs in the sum of four thousand six hundred twenty-four dollars and nine cents ($4,624.09), with interest thereon as allowed by law.

Respectfully submitted.

SAUL RICHARD GAMER,
Commissioner.

APPENDIX C

In the United States Court of Appeals for the Fifth Circuit

No. 17474

KENNETH J. TOBIN AND MARGUERITE R. TOBIN, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

(March 25, 1959)

Action to recover taxes paid. The United States District Court for the Southern District of Florida, Bryan Simpson, J., dismissed the action as time-barred, and an appeal was taken. The Court of Appeals, Hutcheson, Chief Judge, held that 1956 statute dealing with transfers of patents did not establish, but merely confirmed, the already existing right to seek a timely refund, and held that such statute neither took suit for refund out of three-year statute governing overpayment of taxes nor extended period of limitation for filing claims and instituting suits for refunds.

Affirmed.

Internal Revenue ⚷1970, 2026

1956 statute dealing with transfers of patents did not establish, but merely confirmed, the already existing right to seek a timely refund, and such statute neither took suit for refund out of three year statute governing overpayment of taxes nor extended period of limitation for filing claims and instituting suits for refunds. 26 U.S.C.A. (I.R.C. 1939) §§ 117(q), 322(b)(1); 26 U.S.C.A. (I.R.C. 1954) § 7422(a).

Wm. R. Frazier, Jacksonville, Fla., Hill & Frazier, James P. Hill, Jacksonville, Fla., for petitioner.

Meyer Rothwacks, Lee A. Jackson, I. Henry Kutz, George F. Lynch, Attys. Dept. of Justice, Washington, D.C., for appellee. Edith House, Asst. U.S. Atty., Jacksonville, Fla., for respondent.

Charles K. Rice, Asst. Atty. Gen., Dept of Justice, Washington, D.C., James L. Guilmartin, U.S. Atty., Jacksonville, Fla., for appellee.

Before HUTCHESON, *Chief Judge*, and TUTTLE and JONES, *Circuit Judges*

HUTCHESON, Chief Judge: Coming here on a very small record, this appeal is from a judgment dismissing on the ground that the three-year statute of limitations, Sec. 322(b)(1) I.R.C. 1939, 26 U.S.C.A. § 322(b)(1), had barred it, taxpayer's suit for the comparatively small refund of $838.24, overpaid for the year 1951 in connection with receipts from a patent, though it is in quite small compass, it presents questions of more than ordinary interest which have been briefed and argued with care and earnestness. One of these is whether Section 117(q) 1939 I.R.C. added June 29, 1956, 26 U.S.C.A. § 117(q), and dealing with transfers of patents, created a claim against the United States taking the suit out of the three-year statute governing overpayment of taxes and entitling taxpayer to the benefit of the general six-year statute of limitations. The other, in the alternative, is whether, if this is answered in the negative, the section impliedly extended the period of limitation for filing claims and instituting suits for refunds prescribed in Sec. 322(b)(1) I.R.C. 1939 and Sec. 7422(a) I.R.C. 1954, 26 U.S.C.A. § 7422(a).

On their part, taxpayers, opposing to the opinion of the district judge in this case the contrary opinion of the district judge of the Eastern District of Ten-

nessee in *Dempster* v. *United States*, D.C., 162 F. Supp. 585, an opinion presented to and rejected by the trial court in this case, and commending the case to our favorable consideration, support it by arguments of their own generally to the same effect and, as giving sanction to this view, by citing *Philbrick* v. *Commissioner*, 27 T.C. 346 and *Rollman* v. *Commissioner*, 4 Cir., 244 F. 2d 634, cases which, as we read them, do not support it. In the alternative, and citing and quoting in support from *Thomas* v. *Mercantile National Bank*, 5 Cir., 204 F. 2d 943; *United States* v. *Dubuque Packing Co.*, 8 Cir., 233 F. 2d 453, and *Hollander* v. *United States*, 2 Cir., 248 F. 2d 247, taxpayers, assuming that the amendment of the statute was not declaratory but in derogation of the law of the cases, place their reliance upon the argument that the claimed right to refund did not exist before but was created by the amendatory statute and that it must be held therefore that the right did not accrue and limitation did not, indeed could not, begin to run until the passage of the act.

On its part the United States, taking flat issue with taxpayers' claim that the amendatory section created the right to refunds, points to *Myers* v. *Commissioner*, 6 T.C. 258; *Kronner* v. *United States*, Ct.Cl., 110 F.Supp. 730; *Commissioner of Internal Revenue* v. *Celanese Corp.*, 78 U.S.App.D.C. 292, 140 F.2d 339, and *Commissioner of Internal Revenue* v. *Hopkinson*, 2 Cir., 126 F.2d 406, to which we may add from this court, *Allen* v. *Werner*, 5 Cir., 190 F.2d 840, all pre-statute cases, and the recent case from this court of *Bannister* v. *United States*, 262 F.2d 175, Cf. *United States* v. *Carruthers*, 9 Cir., 219 F.2d 21 and *Rollman* v. *Commissioner*, 4 Cir., 244 F.2d 634. So pointing, it declares, correctly we think, that the statute in question did not establish, it merely confirmed, the already existing right to

seek a timely refund and that, under the facts and the controlling law, there is no basis for taxpayer's theory that the ordinary statute limiting claims and suits for tax refunds is not applicable.

Urging upon us that there is no basis in Sec. 322(a)(1) I.R.C.1939 for the gloss which the district judge in the *Dempster* case put on the word "overpayment", the United States points out that in *Jones* v. *Liberty Glass Co.,* 332 U.S. 524, 68 S.Ct. 229, 92 L.Ed. 142 the Supreme Court reviewed the legislative history of this section and, holding that it dealt broadly with income taxes erroneously or illegally assessed and that all income tax refund claims must be filed within three years, rejected the contention that the word "overpayment" should be narrowly or restrictively construed.

Turning to the taxpayers' second contention, that the invoked statute impliedly extended the period of limitation for filing claims by making limitation to commence to run from the passage of the Act, the United States, recognizing that there is a split in the authorities on the general point, insists that the view espoused by the majority in the *Hollander* case is not the correct one. Without ourselves undertaking to determine the correctness of taxpayers' view or of the authorities cited in support of it, based on the taxpayers' assumption that the statute created their right, we think the theory and the authorities have no application here for the reason implicit in the other cases and explicit in *Bannister's* case. This is that the invoked statute did not create the right, it merely came to the aid of the taxpayer in rejecting as unwarranted and bringing under statutory control the commissioner's vacillating and arbitrary action in now accepting and now rejecting in regard to patents the view announced in the cases. What we said there, though not said in this immediate connection,

is, we think, quite appropriate here. There, after pointing out that the statute did not create the right but was merely declaratory and in support of the right declared in the case law, the court said [262 F. 2d 177]:

> While the district judge, reciting that the realities of the situation must control did cite many of cases relied on by appellant, and did declare that the statute should receive a liberal interpretation, it seems to us that, because of the confusion brought on by the Treasury's action, the court below fell into its error. This was that in endeavoring to find in the words of the statute alone the basis for appellants' claim, whereas its real basis was in the case law, of which the statute was more or less declaratory, the court was led into a narrow, instead of a broad, construction, and thereby to deny to the undisputed facts in this case the results which, under the controlling decisions, followed from them.

The judgment was right. It is affirmed.

APPENDIX D

Retroactive Tax Measures 1956–1962

Category I

Of the nine measures falling within this category, four provided for an additional period of six months from the date of the enactment for filing refund claims, and prohibited the payment of interest on refunds. Section 14 of the Technical Amendments Act of 1958, P.L. 85–866, 72 Stat. 1606, 1611, amending Section 172(f) of the 1954 Code relating to net operating losses for years beginning in 1953 and ending in 1954; Section 36 of the Technical Amendments Act of 1958, *supra,* 72 Stat. 1606, 1633, amending Section 613 of the 1954 Code to make 1954 Code percentage depletion rates, at the election of the taxpayer, applicable to a taxable year ending after December 31, 1953, governed by the 1939 Code; Section 92 of the Technical Amendments Act of 1958, *supra,* 72 Stat. 1606, 1667, which added to the 1939 Code Section 22(p), relating to income taxes paid under contract by one corporation for another corporation, and applying to 1939 Code years ending after December 31, 1951; Section 5 of the Act of September 14, 1960, P.L. 86–780, 74 Stat. 1010, 1013, providing for the exclusion from income of moving expenses received between 1950 and 1955 by employees of certain corporations in the atomic energy field.

Three of the nine provided for an additional one-year period from date of enactment for filing claims and prohibited the payment of interest on refunds. Section 93 of the Technical Amendments Act of 1958,

supra, 72 Stat. 1606, 1668, amending Section 812(e)(1)(F) of the 1939 Code, relating to the marital deduction, and applicable to estates of decedents dying after April 1, 1948; Section 26 of the Revenue Act of 1962, P.L. 87–834, 76 Stat. 960, 1067, amending Section 188 of the 1939 Code (relating to different taxable years of partner and partnership) with respect to years after December 31, 1946; Section 27 of the Revenue Act of 1962, *supra*, 76 Stat. 960, 1067, providing for the exclusion from gross income of Japanese-American evacuation claims in years ending after July 2, 1948 (of the nine measures in this category, this was the only one silent as to the effect of closing agreement or compromise).

Two of the nine also provided for an additional one-year period from date of enactment for filing claims, but were silent as to interest. Section 2 of the Act of June 29, 1956, c. 464, 70 Stat. 404, amended Section 106 of the 1939 Code, relating to certain claims against the United States, and applied to years ending after December 31, 1948 (*this is Section 2 of the identical Act which added Section 117(q) to the 1939 Code*). Section 100 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1673, made Section 106 of the 1939 Code (so far as it related to reasonable cause for failure to file a return) applicable to years ending after December 31, 1942.

Category II

The only measure during this period which we have found which substituted a different period measured from the date of filing the return for that provided in Section 322(b)(1) is the Act of February 15, 1956, c. 36, 70 Stat. 15, amending Section 120 of the 1939 Code (and applicable to all years governed by that Code) to liberalize the unlimited deduction for char-

itable contributions, and to provide a limitations period of seven, rather than three, years from the filing of the return. That Act also provided that no interest was to be paid on the refund, and that the refund would not be made unless it would be paid forthwith as a charitable contribution.

Category III

Those measures which simply extended the statutory period for filing claims were as follows: Act of August 1, 1956, c. 857, 70 Stat. 917, which created an additional one year period from date of enactment (except where there had been closing agreement or compromise) for filing claims under the Act of October 25, 1949, c. 720, 63 Stat. 891, when such claims had been barred on the date of that enactment; Section 65 of the Technical Amendments Act of 1958, *supra,* 72 Stat. 1606, 1657, which applied with respect to decedents dying after February 10, 1939, and provided for an additional period of 60 days after notice of disallowance of a claim for refund of estate taxes, or 60 days after court decision on such claim becomes final, for filing a claim for credit for state death taxes; Section 96 of the Technical Amendments Act of 1958, *supra,* 72 Stat. 1606, 1672, which provided (except where there had been closing agreement or compromise) an additional 60 day period for filing claims for refund of income taxes based upon 1954 education expenses affected by a change of the regulations; Section 98 of the Technical Amendments Act of 1958, *supra,* 72 Stat. 1606, 1673, which provided that in the case of overpayments of income tax resulting from erroneous inclusion in income of sick pay, if claim for refund was timely filed after December 31, 1951, the period for commencing suits for refund should not expire prior to one year after that enactment; Act of September 16, 1959, P.L. 86-280, 73 Stat. 563,

in Section 1 extended the time for filing claims, with respect to net operating loss carrybacks arising from the elimination of excessive profits by renegotiation from years ending after December 31, 1952, to either September 1, 1959, or one year after the agreement or order for the renegotiation became final, whichever was later (Section 2 of the same Act directed the making of an income tax refund of $383.64 to a specific taxpayer, notwithstanding any period of limitations otherwise applicable).

Category IV

Of the ten elective measures applicable to prior years, the five specifically applicable only to open years (or years open as of a specific date) were the following: The Dealer Reserve Income Adjustment Act of 1960, P.L. 86-459, 74 Stat. 124, permitted elections with respect to all years open on June 21, 1959, and extended the period for assessment of a deficiency or filing of a claim for refund with respect to such years (unless closed by closing agreement or compromise as of the date of enactment) to September 1, 1961. Three recent percentage depletion measures permitted an election applicable to all years open on the date of enactment, and provided that the period for assessment or refund for a year affected by the election should not expire prior to one year from the last day for making such election. Section 4 of the Act of September 14, 1960, P.L. 86-781, 74 Stat. 1017, 1018 (relating to calcium carbonates); Act of September 26, 1961, P.L. 87-312, 75 Stat. 674 (relating to certain clays); Section 2 of the Act of September 26, 1961, P.L. 87-321, 75 Stat. 683 (quartzite and clay used in the production of refractory products). Section 37 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1633, also relating

to percentage depletion, had contained a similar provision permitting an election as to open years beginning with 1954.

Two of the ten specifically extended the period of limitations as to closed years. Section 29 of the Technical Amendments Act of 1958, *supra,* 72 Stat. 1606, 1626, gave the taxpayer an election to be exercised within six months from date of enactment to return to the accounting method from which he had previously changed, and also extended the period of limitations (as to assessment or refund) to one year from the date the election was made. The first section of the Act of October 23, 1962, P.L. 87–870, 76 Stat. 1158, gave terminal railroad corporations and their shareholders an election to exclude from the former's income certain "related terminal income", increasing the shareholders' income proportionately. This election could be made retroactively back to 1939, even though the years were barred, provided that (1) all parties had reported income on their returns in this manner, (2) there had been no closing agreement or compromise, (3) claim for refund was filed within one year from date of enactment, and (4) the shareholders consented to assessment of the correlative deficiencies. See also Section 99 of the Technical Amendments Act of 1958, *supra,* 72 Stat. 1606, 1673, which gave certain motor carriers an election, exercisable within one year from the date of the enactment, to accrue amounts received in settlements of claims against the United States for the taking of motor transportation systems under a 1944 Executive Order in those years when such system was in the possession of the United States; this provision was silent as to any extension of the time for filing refund claims, but did specifically extend the period for assessing deficiencies resulting from such election

to one year from the time the election was made, and also prohibited the collection of interest on such deficiency for any period prior to March 15, 1953.

Two of the ten specifically provided for the "tolling" of the statute. Section 63 of the Technical Amendments Act of 1958, *supra,* 72 Stat. 1606, 1649, relating to revocation of elections under Section 1361 of the 1954 Code (permitting certain unincorporated businesses to be taxed as corporations); Section 23 of the Revenue Act of 1962, P.L. 87-834, 76 Stat. 960, 1065, providing for the application of Section 1371(c) (relating to the definitional rules under the provisions permitting small corporations to elect to be taxed as partnerships) to years beginning after December 31, 1957.

The Retirement-Straight Line Adjustment Act of 1958, Section 94 of the Technical Amendments Act of 1958, *supra,* 72 Stat. 1606, 1669, which is involved in the *New York, Chicago, and St. Louis Railroad Co.* case now pending before the Court of Claims, was silent on the limitations question.

Category V

Seven of the eleven retroactive relief measures which were silent as to the limitations question prohibited the payment of interest. Act of January 28, 1956, c. 18, 70 Stat. 8, which amended, with respect to computation of credits for dividends received without reduction for excess of capital gain, Section 117 (c)(1)(A) of the 1939 Code, and applied to years beginning after December 31, 1951; Act of February 20, 1956, c. 66, 70 Stat. 26, which amended the 1939 Code by adding Section 814, relating to a credit for certain prior transfers in the case of decedents dying after December 31, 1951; Section 3 of the Act of June 29, 1956, c. 464, 70 Stat. 404, which added to the 1939 Code, effective as of the Code's enactment, Sec-

tion 115(n), relating to distributions by corporations; Act of February 11, 1958, P.L. 85–318, 72 Stat. 3, which amended Section 812(e)(1)(D) of the 1939 Code with respect to decedents who were adjudged incompetent before April 2, 1948, and was applicable to estates of decedents dying after that date; Section 103 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1675, amending Section 131(e) of the 1939 Code, with respect to the foreign tax credit for United Kingdom income tax paid with respect to royalties, and applicable to taxable years beginning January 1, 1950; Act of February 11, 1958, P.L. 85–319, 72 Stat. 4, which amended Section 223 of the Revenue Act of 1950, c. 994, 64 Stat. 906, relating to personal holding company income, to make it applicable to years ending in 1954 governed by the 1939 Code; Act of August 7, 1959, P.L. 86–141, 73 Stat. 288, which amended Section 2038 of the 1954 Code (relating to revocable transfers) with respect to the effect of a disability beginning prior to October 1, 1947, and ending at death, and was applicable to estates of decedents dying after August 16, 1954.

Four (in addition to Section 117(q)) were silent as to interest, as well as limitations. Section 1 of the Act of February 20, 1956, c. 63, 70 Stat. 23, amending Section 208(b) of the Technical Changes Act of 1953, c. 512, 67 Stat. 615, to make it effective with respect to decedents dying after December 31, 1947, instead of December 31, 1950; Section 30 of the Revenue Act of 1962, *supra*, 76 Stat. 960, 1069, making Section 2(b) of the Act of September 23, 1959, P.L. 86–376, (73 Stat. 699), permitting a net operating loss of a small business corporation to be allowed as a deduction in the final taxable year of a shareholder who dies before the end of the corporation's taxable year, applicable as of September 2,

1958, rather than September 24, 1959, as that Act had provided; Section 5 of the Act of September 14, 1960, P.L. 86–781, 74 Stat. 1017, 1019, giving named pension trusts exemption from taxation for specified prior periods; Sections 1 and 4 of the Act of June 27, 1961, P.L. 87–59, 75 Stat. 120 (semble).

U.S. GOVERNMENT PRINTING OFFICE: [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 44

UNITED STATES OF AMERICA, *Petitioner*

v.

AARON ZACKS and FLORENCE ZACKS

On Petition for a Writ of Certiorari to The United States Court of Claims

BRIEF FOR THE RESPONDENT IN OPPOSITION

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CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 632

UNITED STATES OF AMERICA, *Petitioner*

v.

AARON ZACKS and FLORENCE ZACKS

On Petition for a Writ of Certiorari to
The United States Court of Claims

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 22-26) is reported at 280 F. 2d 829.

JURISDICTION

The judgment of the Court of Claims was entered on July 6, 1962 (Pet. 27). The petition for a writ of certiorari was filed on December 3, 1962, pursuant to an extension of time. The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

QUESTION PRESENTED

Does the 1956 remedial and retroactive amendment of the Internal Revenue Code of 1939 implicitly give the taxpayers a cause of action as to the year 1952 which is not barred by the general two or three-year statutes of limitation?

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * * * * * * *

(q) [as added by Sec. 1 of the Act of June 29, 1956, c. 464, 70 Stat. 404] *Transfer of Patent Rights.*—

(1) *General Rule.*—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are—

(A) payable periodically over a period generally coterminous with the transferee's use of the patent, or

(B) contingent on the productivity, use, or disposition of the property transferred.

* * * * * * * * *

(4) *Applicability.*—This subsection shall apply with respect to any amount received, or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred.

(26 U. S. C., Supp. V, Appendix, 117.)

SEC. 322. REFUNDS AND CREDITS.

* * * * * * * * *

(b) *Limitation on Allowance.*—

(1) *Period of Limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * * * * * *

STATEMENT

For the calendar year 1952 taxpayers as husband and wife filed a timely Federal income tax return. In it they reported as ordinary income in excess of $36,000.00 which they had received as patent royalties. This action was in accord with the then existing rulings of the Internal Revenue Service. (Pet. 23, 29.)

On June 29, 1956, Congress enacted Public Law 629 which added §117(q) to the Internal Revenue Code of 1939. The new statute provided that qualifying patent royalties received during the years 1950 through 1954 were to be taxed as long-term capital gains to accord with the treatment given this type of income by §1235 of the Internal Revenue Code of 1954 (Pet. 3).

On or about June 23, 1958, taxpayers filed a claim for refund on Treasury Department Form 843 in which they sought to recover the difference between the tax as ordinary income and the tax as long-term capital gain on the patent royalties received by them during

1952 (Pet. 28). More than six months elapsed without any action having been taken by the Commissioner of Internal Revenue with regard to the aforesaid claim for refund (R. 1-4).

This suit was filed on March 5, 1959. In its answer filed on May 4, 1959, the Government asserted as a second defense that the applicable statutes of limitation prevent a recovery in this proceeding (R. 7-8; Pet. 28). The issue was presented to the Court of Claims on a motion filed by taxpayers to strike the second defense (R. 9). This motion was granted (Pet. 26).

ARGUMENT

The decision below is correct. Any fundamental conflict of principles that may exist was also in existence when the Government opposed certiorari in *Dempster* v. *United States*, 361 U. S. 819. The decision below presents no question warranting review by this Court.

1. In deciding the case at bar the Court of Claims relied on two cases—*Verckler* v. *United States*, 170 F. Supp. 802, and *Hollander* v. *United States*, 2 Cir., 248 F. 2d 247 (Pet. 25-26). Those two cases formed the primary basis for the petition for certiorari in *Dempster* v. *United States*, 361 U. S. 819 (October Term, 1959, No. 135, Petition, p. 7). In opposing that petition the United States said in part (Brief in Opposition, pp. 10-11):

> On the question of whether Section 117(q) impliedly extended the three-year statute of limitations provided in Section 322(b)(1), there is no direct conflict of authority. The cases cited by taxpayer (Pet. 10) involved different statutory provisions and different situations. Thus, *Hollander* v. *United States*, 248 F. 2d 247 (C.A. 2),

> involved remedial legislation designed to provide retroactive tax relief for estates of decedents under circumstances where, as the Second Circuit said, Congress must have known that the application of the bar of Sections 910 and 911 of the Internal Revenue Code of 1939 upon the filing of refund claims and instituting suits for recovery would probably have nullified the relief proposed. As pointed out above, this is not the situation here. Again, prior to the passage of the amending Act involved in *Verckler* v. *United States, supra,* which also was designed to provide tax relief to the estates of certain decedents, no cause of action existed and a taxpayer did not have a right to claim and receive a refund of the tax. (Footnotes ommitted.)

Since the Government found "no direct conflict of decisions, and no other basis warranting review" when the *Dempster* petition was pending, and since the present proceeding is merely a repetition of the *Hollander-Verckler* principles, it is submitted that this petition should be denied for the same reasons urged effectively in the *Dempster* case.

2. The 1956 legislation here involved gave to professional inventors rights which they did not have prior to the amendment and it materially changed for capital gain purposes the holding-period requirements regarding patents. These basic changes are conceded in the pending petition for a writ of certiorari (p. 14, fn. 10). It is unrealistic to think that Congress in 1956 would make such fundamental changes of a remedial nature in the tax laws, would make the revisions effective for the years 1950 to 1954, and at the same time intend that the benefit of these changes for the first few years would be barred by the general statutes of limitation. Had Congress not intended this legislation to be effec-

tive for the otherwise barred years, its application to 1950, 1951, and 1952 was certainly "an idle gesture" as noted by the Court below (Pet. 25). It seems farfetched to attempt to answer this interpretation by asserting (Pet. 11-12) that Congress intended to benefit only the litigious taxpayers and not those who were following the administrative rulings.

3. The Government urges that this proceeding involving a judgment of $4,624.09 (Pet. 27) is important because of its effect on certain railroad legislation involving millions of dollars (Pet. 16, fn. 14). If this railroad problem is the real concern of the Government, then it is submitted that the time to consider the Retirement-Straight Line Adjustment Act of 1958 is *after* that statute has been construed by the lower courts and not in anticipation thereof by indirection in a relatively unimportant patent case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December, 1962

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 44

UNITED STATES OF AMERICA, PETITIONER

v.

AARON ZACKS AND FLORENCE ZACKS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 11–14) is reported at 280 F. 2d 829.

JURISDICTION

The judgment of the Court of Claims was entered on July 6, 1962. (R. 22.) On October 4, 1962, by order of the Chief Justice, the time within which to file a petition for a writ of certiorari was extended to and including December 3, 1962. (R. 30.) The petition was filed on December 3, 1962, and granted on January 14, 1963. (R. 31; 371 U.S. 961.) The jurisdiction of this Court rests on 28 U.S.C., 1255(1).

QUESTION PRESENTED

Whether a retroactive amendment clarifying or modifying a substantive provision of the Internal

Revenue Code gives rise to a claim for refund for a year barred by the statute of limitations in the absence of a provision expressly extending or renewing the limitations period.

STATUTES INVOLVED

The Act of June 29, 1956, 70 Stat. 404; Section 322(b)(1) of the Internal Revenue Code of 1939; and Section 7422(a) of the Internal Revenue Code of 1954, are set forth in Appendix A, *infra*, pp. 46–53.

STATEMENT

In 1952, Florence Zacks received royalties from a manufacturing corporation to which she had transferred all substantial rights under patents granted on certain clothing items she had originated. The royalties, amounting to about $37,000, were reported as ordinary income in the 1952 joint income tax return filed by Mrs. Zacks and her husband, Aaron Zacks ("taxpayers") on April 15, 1953. (R. 2, 6.) The last payment of 1952 income tax was made on or before September 28, 1953. (R. 6.) The statute of limitations normally applicable to a claim for refund of the taxpayers' 1952 taxes would accordingly have expired on March 15, 1956, three years from the date on which the return was filed. (Section 322(b)(1), Internal Revenue Code of 1939.)

On June 23, 1958, taxpayers filed a claim for refund of 1952 income tax on the ground that the aforesaid royalties were taxable under Section 117(q) of the Internal Revenue Code of 1939, enacted June 29, 1956 (Section 1, P.L. 629, 70 Stat. 404), as long-term capital gains rather than ordinary income. (R. 2, 5.)

Section 117(q) provided that a transfer of all substantial rights to a patent by any individual whose efforts created such property shall be treated as the sale or exchange of a capital asset held for more than six months, whether or not the consideration is received in the form of periodic royalties. The amendment was made applicable with respect to any amount received pursuant to such a transfer in any taxable year beginning after May 31, 1950, regardless of the taxable year in which the transfer occurred.

On March 5, 1959, no action having been taken on their refund claim, taxpayers filed a petition in the Court of Claims on the same ground, seeking a refund of $10,636.06 plus interest. (R. 1–3.) In its answer the United States asserted as one of its defenses that the Court of Claims had no jurisdiction over the refund suit because the claim for refund had not been filed within three years of the filing of the return or within two years of the payment of the tax, as required by Section 322(b)(1) of the Internal Revenue Code of 1939, and that the suit was therefore barred by Section 7422(a) of the Internal Revenue Code of 1954. (R. 6–7.) Taxpayers filed a motion (R. 8) to strike the defense of the statute of limitations, and, on July 15, 1960, the Court of Claims issued a decision granting the motion and returning the case to the Trial Commissioner for further proceedings (R. 11–14).

There followed a trial on the merits. Although a portion of the royalties in question admittedly qualified for long-term capital-gain treatment under Section 117(q), the parties disagreed as to the extent to

which the balance constituted consideration for the transfer of the patent rights or compensation for Mrs. Zacks' services as a designer. After the trial was concluded, but before the filing of the Trial Commissioner's report, the factual dispute was compromised by a stipulation between the parties that $15,035.98 of the 1952 royalties was received in exchange for the transfer of the patent rights. The stipulation, which also resolved the remaining minor issues in the case, fixed the amount of taxpayers' recovery at $4,624.09, plus interest (assuming that the refund claim was timely), but expressly reserved to the United States the right to seek review in this Court of the question whether taxpayers' claim for refund and subsequent suit were timely. (R. 17–18.) On July 6, 1962, the Court of Claims entered judgment on the stipulation, reciting that "plaintiffs agreed to accept the sum of $4,624.09, with interest thereon as allowed by law, in full settlement of all claims set forth in the petition, without prejudice, however, to defendant's right to file a petition for certiorari in the Supreme Court to review the question whether plaintiffs' claim for refund and suit herein were timely filed, and the defendant consented to the entry of judgment in that amount and upon such condition." (R. 22.)

In holding that the refund claim was timely, the Court of Claims ruled that the enactment of Section 117(q) created a new cause of action and therefore a new period of limitations. It reasoned that "at least insofar as taxable years barred by the statute of limitations are concerned, Congress intended by the passage of Public Law 629 to give taxpayers a right

which they did not have before its passage," and that, had Congress not so intended, "it was an idle gesture to have made it [Public Law 629] applicable to years as far back as 1950." (R. 14.)

SUMMARY OF ARGUMENT

Section 117(q) of the Internal Revenue Code of 1939, an amendment adopted in 1956 and made applicable to taxable years beginning after May 31, 1950, provided that a transfer of all substantial rights to a patent would be treated as the sale or exchange of a capital asset held for more than six months even though the consideration took the form of periodic payments measured by the productivity of the patent in the buyer's hands. The purpose of the amendment was to establish for years prior to 1954 the right to capital-gains treatment which most of the courts had upheld under prior law, and which Section 1235 of the 1954 Code had decreed prospectively, but which the Commissioner had vigorously contested for taxable years between 1950 and 1954. The issue presented is whether Section 117(q) by implication reopened those taxable years which were barred by the statute of limitations on the date of enactment.

A. Section 117(q) does not, on its face, affect in any way the operation of the normal limitations provisions. Although it announced a rule of *substantive* law applicable to taxable years beginning in 1950, it does not purport to change the *procedural* prerequisites for invoking that rule. To hold that it does so implicitly is to disregard the cardinal rule that a subsequent statute ought not be deemed to repeal a prior

one by implication unless there is a "positive repugnancy" between the two. *United States* v. *Borden*, 308 U.S. 188, 198–199; *Graham & Foster* v. *Goodcell*, 282 U.S. 409.

B. A survey of similar remedial tax legislation enacted by Congress between 1953 and 1962 leaves no doubt but that Congress was aware of the limitations problem and that when it wished to reopen barred years it did so in explicit terms. Of the 47 tax measures applicable to years normally closed, 9 made some amendment to the statutory substantive law and also granted an additional period of six months or one year (measured from the date of enactment) for filing refund claims; one made a substantive change and extended the normal limitations period to seven years (measured from date of filing return); 15 changed the statutory substantive law but were silent as to limitations; 9 made no modification of the statutory substantive law but extended (for periods up to one year) the time for seeking refunds; and 13 allowed taxpayers to make an election which would determine the tax treatment of certain items for specified past years and in all but two instances gave additional time (up to one year) for claiming refunds, assessing deficiencies, or both. In light of this pattern of discriminating solutions, it seems particularly inappropriate for a court, substituting its judgment for that of Congress, to conclude that a statute which is silent on the matter must be deemed to create by implication an additional period of at least two years for filing refund claims. If that interpretation were sound, then those provisions which specifically give

the taxpayer an additional grace period of one year or less would actually operate to shorten the time that would otherwise be available for claiming a refund, and taxpayers for whom Congress made no provision for extending the statute would be treated more favorably than those for whom such provision was expressly made.

In a number of instances, the legislative history of provisions containing no special limitations provision shows conclusively that Congress did not intend to reopen barred years. And the history of several other measures which do expressly grant an additional grace period shows that Congress believed barred years would remain closed unless expressly reopened.

C. To hold that the retroactive amendment of a substantive tax statute would be an "idle gesture" unless it reopened barred years is to misconceive the character of this class of legislation. Such changes are often enacted (a) to settle an outstanding controversy without litigation or (b) to remedy a specific case of hardship which has come to the attention of Congress—purposes which do not require a renewal of the limitations period. Section 117(q) is a prime example of a statute aimed at putting to rest a live controversy and thereby relieving existing refund claimants of the need to battle their way through the courts. Congress recognized that many taxpayers who had filed timely refund claims for the years beginning after May 31, 1950, were faced with burdensome litigation as a result of the Commissioner's refusal to extend to them the capital gains treatment

which most of the courts had approved; the purpose of the statute was to eliminate the necessity for that litigation. There is no reason to believe Congress meant it to do more than perform the function served by a decision of this Court, which resolves the dispute between the parties before it, furnishes a precedent for actual or potential litigation, but affords no benefit whatever to similarly situated persons whose right to sue has expired.

D. The prescription of time limitations is and always has been the province of the legislator, not the judge; the mechanical and arbitrary rules involved in that task cannot readily be fashioned by the techniques upon which courts must rely. The difficulties awaiting a court which ventures into this area are illustrated by the instant case; for, assuming that the enactment of a retroactive statute does set in motion a new limitations period, there remains the question as to how long that period should be—a question to which several, almost equally plausible, answers might be given.

E. It is immaterial to the limitations question whether the substantive amendment "creates new rights" or merely "confirms existing rights."

ARGUMENT

INTRODUCTORY

Section 117(q) of the Internal Revenue Code of 1939, enacted June 29, 1956 (by Section 1 of P.L. 629, 70 Stat. 404), provided that a transfer of all substantial rights to a patent by any individual whose efforts created such property—

shall be considered the sale or exchange of a capital asset held for more than six months, regardless of whether or not payments in consideration of such transfer are—

(A) payable periodically over a period generally coterminous with the transferee's use of the patent, or

(B) contingent on the productivity, use, or disposition of the property transferred.

The provision was expressly made applicable with respect to amounts received pursuant to a transfer—

in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred.

Although the substantive meaning and application of section 117(q) are not at issue here, a brief summary of its background is important to an understanding of the issue which is presented.

In 1946, the Commissioner announced his acquiescence in *Edward C. Myers*, 66 T.C. 258, a Tax Court decision holding that the granting of an exclusive license of all rights under a patent constituted the sale or exchange of a capital asset, even though the consideration took the form of annual royalties based on a percentage of the price of the article sold. 1946-1 Cum. Bull. 3. Later, on March 20, 1950, he withdrew the acquiescence, substituted a nonacquiescence, and announced that he would not accord capital gains treatment to royalties under such a license in taxable years beginning after May 31, 1950. Mim. 6490, 1950-1 Cum Bull. 9. Despite the rejection

of this position by several courts,[1] the Commissioner adhered to it in the years that followed. Congress ultimately resolved the problem prospectively in Section 1235 of the 1954 Code, which provided, for 1954 and subsequent years, that the transfer of all substantial rights under a patent should be deemed "the sale or exchange of a capital asset held for more than 6 months," even though payment was received in the form of periodic royalties, dependent upon the productivity, use, or disposition of the patent transferred. Insofar as Section 1235 settled that such a transfer was to be treated as a "sale or exchange", rather than a license, it merely enacted for the future the "majority" view of the prior case law. It admittedly changed the law, however, in at least[2] two respects, *i.e.*, by affording long-term capital gain treatment to all qualifying transfers of patent rights without reference to whether (a) the rights transferred were capital assets (as they would not be if the patents were held primarily for sale in the ordinary course of business), or (b) had been held for the requisite

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[1] *Kronner* v. *United States*, 110 F. Supp. 730 (C. Cl.); *Allen* v. *Werner*, 190 F. 2d 840 (C.A. 5); *Commissioner* v. *Celanese Corp.*, 140 F. 2d 339 (C.A.D.C.); *Commissioner* v. *Hopkinson*, 126 F. 2d 406 (C.A. 2d). Contra, *Bloch* v. *United States*, 200 F. 2d 63 (C.A. 2d).

[2] In the particulars noted above, Section 1235 liberalized the prior law. However, it appears that in other particulars, as, for example where exclusive licenses limited geographically were concerned, or where some, but not all, of the claims and uses covered by the patent were conveyed, Section 1235 may have the effect of a restrictive provision. See the comment in 3B Mertens, *Law of Federal Income Taxation* (Rev. ed.), Section 22.135.

holding period.[3] In 1955, the Commissioner issued another ruling, Rev. Rul. 55-58, 1955-1 Cum. Bull. 97, in which he stated that he was convinced of the correctness of Mim. 6490, and would continue to apply it to payments received in taxable years beginning after May 31, 1950, and before January 1, 1954, the period not covered by Section 1235. The courts continued to reject the Commissioner's position.[4] It was to resolve that controversy that Congress, on June 29, 1956, added Section 117(q), a provision substantially identical in substantive terms to Section 1235, but made applicable to "any taxable year beginning after May 31, 1950."

The issue presented in this case is whether a retroactive statute, such as Section 117(q), which reaches back to years normally barred by the statute of limitations should be deemed to create, *sub silentio*, a new limitations period. Conflicting answers have been given by the appellate courts, with the Fifth and

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[3] Both these changes were specifically noted in the Conference Report. See H. Conf. Rep. No. 2543, p. 70 (App. B, *infra*, p. 61) (3 U.S.C. Cong. and Adm. News (1954) 5280, 5331). The elimination of the distinction between amateur and professional inventors was noted several times in the Senate Report. S. Rep. No. 1622, pp. 113-114, 438-441 (App. B, *infra*, pp. 54, 59) (3 U.S.C. Cong. and Adm. News (1954) 4621, 4747, 5081-5084).

[4] *Watson* v. *United States*, 222 F. 2d 689 (C.A. 10th); *United States* v. *Carruthers*, 219 F. 2d 21 (C.A. 9th); *Vincent A. Marco*, 25 T.C. 544; *Roy J. Champayne*, 26 T.C. 634, 646-647; *Rose Marie Reid*, 26 T.C. 622, 632. See also *Rollman* v. *Commissioner*, 244 F. 2d 634 (C.A. 4th), decided subsequent to the enactment of Section 117(q).

Sixth Circuits[5] holding "No", and the Second Circuit[6] and the Court of Claims (both in the decision below and in other decisions)[7] holding "Yes." There was no discussion in the decision below as to what, if any, limitations period did apply to the taxpayers' refund claim. However, in *Verckler* v. *United States*, 170 F. Supp. 802, an earlier case involving a claim for refund of estate tax, the Court of Claims considered essentially the same question and treated a retroactive relief statute as giving rise to a constructive "payment" of tax upon the date of its enactment, at which time the normal limitations period dating from the time of payment would begin to run.[8] That

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[5] *Tobin* v. *United States*, 264 F. 2d 845 (C.A. 5th); *Tobin* v. *Tomlinson*, 310 F. 2d 648 (C.A. 5th), petition for certiorari pending (No. 70, 1963 Term); *United States* v. *Dempster*, 265 F. 2d 666 (C.A. 6th), certiorari denied, 361 U.S. 819. To the same effect, see *Vaughan* v. *United States*, 181 F. Supp. 386 (S.D. Cal. 1959). See also earlier decisions such as *White's Will* v. *Commissioner*, 142 F. 2d 746 (C.A. 3d, 1944); *Merrill* v. *United States*, 152 F. 2d 74 (C.A. 2d, 1945); *Ross* v. *United States*, 75 F. Supp. 725 (C. Cls. 1948), certiorari denied, 334 U.S. 832, all involving the retroactive relief accorded by Congress in 1942 in connection with deductibility of non-trade or non-business expenses.

[6] *Hollander* v. *United States*, 248 F. 2d 247 (C.A. 2d).

[7] *Verckler* v. *United States*, 170 F. Supp. 802 (C. Cls.); *Lorenz* v. *United States*, 298 F. 2d 746 (C. Cls.).

[8] The applicable limitations statute in *Verckler* was Section 910 of the 1939 Code. In contrast to Section 322(b) of the 1939 Code, which provides a number of alternative limitations periods for the filing of refund claims with respect to income tax, Section 910, which performs the corresponding function of establishing the limitations period with respect to claims for refund of estate tax, provides but one limitations period—three years from date of payment of the tax.

construction was subsequently approved and applied by the court below in *Eastman Kodak Co.* v. *United States*, 292 F. 2d 901, 904, 905,[9] and *Lorenz* v. *United States*, 296 F. 2d 746. Accordingly, so far as Section 117(q) is concerned, the limitations period applied by the court below would be two years from the date of enactment, June 29, 1956.[10]

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[9] *Eastman Kodak* involved the question whether a suit for refund of excise taxes because of a readjustment of the sales price occurring after the taxes were paid had to be preceded by the filing of a claim for refund of taxes "erroneously or illegally assessed or collected." The Court of Claims held that it did, reasoning that taxes became "erroneously or illegally assessed or collected" on the date of the subsequent occurrence making them so, whether this subsequent occurrence be a readjustment of the sales price or a retroactive tax relief measure (292 F. 2d at 905–907).

[10] In an unreported decision filed July 2, 1962 (*Walter* v. *United States*, C. Cls. No. 160–61), the court dismissed as untimely a claim filed more than two years after the enactment of Section 117(q). Following this decision, four similar cases pending in the Court of Claims were dismissed either by order or stipulation. *Alfandre* v. *United States*, No. 209–62 (stipulation dated September 28, 1962); *Church* v. *United States*, No. 205–62 (order dated October 22, 1962); *Caster* v. *United States*, No. 469–60 (order dated October 22, 1962); *Puschelberg* v. *United States*, No. 101–60 (order dated November 2, 1962). Similarly, in *Smith* v. *United States*, 304 F. 2d 267, now pending on taxpayer's petition for certiorari No. 14, October Term, 1963, the Third Circuit held that, even assuming that Section 117(q) created a new period of limitations, a claim filed more than two years after enactment was untimely.

AMENDMENTS RETROACTIVELY CLARIFYING OR MODIFYING SUBSTANTIVE PROVISIONS OF THE INTERNAL REVENUE CODE DO NOT GIVE RISE TO A CLAIM FOR REFUND FOR A YEAR BARRED BY THE STATUTE OF LIMITATIONS IN THE ABSENCE OF AN EXPRESS PROVISION RENEWING THE LIMITATIONS PERIOD

A. TO FIND AN IMPLIED WAIVER WOULD VIOLATE THE RULE THAT A REPEAL BY IMPLICATION WILL NOT BE INFERRED IN THE ABSENCE OF POSITIVE REPUGNANCY

Section 322(b)(1) of the 1939 Code provides that—

> Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. * * *

Since the taxpayers here filed a joint return on or before March 15, 1953, completed payment of the tax on September 28, 1953, and did not file a claim for refund until June 23, 1958, their present suit is plainly barred unless Section 117(q) somehow renders inapplicable the normal statutory limitations. But Section 117(q) patently does not do that. Although it announced a rule of *substantive* law applicable to taxable years beginning in 1950, it does not purport to change the *procedural* prerequisites for invoking that rule. And to hold that it changes the generally applicable procedure implicitly is to disregard the cardinal rule that a subsequent statute ought not be deemed to repeal a prior one by implication unless there is a "positive repugnancy" between the two.

United States v. *Borden*, 308 U.S. 188, 198–199; *Graham & Foster* v. *Goodcell*, 282 U.S. 409.

This is not a case in which a court is called upon to resolve ambiguities in a statute, or to decide whether the boundaries of a statute are broad enough to cover a situation not expressly provided for, or to determine which of two possibly applicable provisions (*e.g.,* limitations periods) is the one which controls. There is no lacuna in the legislative scheme which requires judicial filling. Section 322(b)(1) squarely governs, and the only question is whether it was superseded *sub silentio* by a later enactment which on its face has nothing to do with limitations.

B. LEGISLATIVE PRACTICE IN THE ENACTMENT OF RETROACTIVE AMENDMENTS TO THE REVENUE LAWS SHOWS THAT CONGRESS EXPRESSLY CREATES A NEW CLAIM OR WAIVES THE BAR OF LIMITATIONS WHEN THAT CONSEQUENCE IS DESIRED

1. *The Pattern of Retroactive Statutes as Shown by Their Text*

In addition to Section 117(q), Congress, between 1953 and 1962, passed at least 47 other retroactive tax measures applicable to years normally barred by the statute of limitations.[11] Thirty of them expressly

[11] In our petition for certiorari we enumerated 36 retroactive tax statutes enacted during the period 1956 to 1962. We now expand that survey to include the three calendar years (1953–1955) which immediately preceded the enactment of Section 117(q). For the earlier period we have found 13 retroactive amendments, of which 8 expressly extended the time for claiming refunds or assessing deficiencies, while 5 did not. In addition, we have modified the list of statutes set forth in the petition by adding one measure—Section 99 of the Technical Amendments Act of 1958 (App. 118)—and by removing three provisions—Section 4 of the Act of September 14, 1960; Act of

extended the time for claiming refunds (or assessing deficiencies) while 17 did not. A survey of this legislation leaves no doubt but that Congress was aware of the limitations problem and that when it wished to create an exception to the normal statute of limitations it did so in explicit terms.

The 47 provisions, grouped in five categories, are set forth and discussed extensively in Appendix C, *infra* (hereafter referred to as "App."). Here we merely summarize:

Category I, the most homogeneous grouping, con-

September 26, 1961, P.L. 87-312; and Act of September 26, 1961, P.L. 87-321 (for explanation of removal see *infra*, pp. 25-26). The respects in which the five categories set forth in Appendix C, *infra*, differ from those summarized in the petition are as follows (Numbers in parentheses are those used for identification purposes in Appendix C, *infra*):

Category I—*Added* (1): Sec. 207 of the Technical Changes Act of 1953 (No. 4). *Removed:* Sec. 36 of the Technical Amendments Act of 1958 (properly classified in Category IV (No. 28)).

Category II—no change.

Category III—*Added* (4): Sec. 211 of the Technical Changes Act of 1953; Sec. 202(a)(2) of the Social Security Amendments of 1954; Act of August 9, 1955, 69 Stat. 594; Act of August 9, 1955, 69 Stat. 607 (Nos. 11-14).

Category IV—*Added* (6): Secs. 202, 210, 103, 102, of the Technical Changes Act of 1953 (Nos. 20, 21, 31, 32); Sec. 99 of the Technical Amendments Act of 1958 (referred to in petition for certiorari, at p. 40, but not tabulated (No. 29); Sec. 36 of the Technical Amendments Act of 1958 (transferred from Category I (No. 28). Removed (3): Sec. 4 of the Act of September 14, 1960, P.L. 86-781; Act of September 26, 1961, P.L. 87-312; Act of September 26, 1961, P.L. 87-321 (for explanation of removal, see *infra*, pp. 25-26).

Category V—*Added* (4): Sec. 209 of the Technical Changes Act of 1953; Act of August 11, 1955; Sec. 3 of the Act of August 7, 1953; Sec. 1 of the Act of August 9, 1955 (Nos. 33, 34, 42, 43).

tains nine provisions, each of which (a) made some amendment or addition to the statutory substantive law and (b) provided an additional period (measured from the date of enactment) for filing refund claims barred on the date of enactment. In three instances that period was six months, and in six instances one year. Eight of the nine measures specifically stated that the bar of a prior closing agreement or compromise was not lifted; one contained no such provision. Seven of the nine expressly prohibited the payment of interest on any refund, while two did not. In one instance, the limitation period was extended only with respect to estates for which the federal estate tax liability was under litigation as of January 17, 1949. The "extender" provisions in this category show little variation, all but two taking substantially the following form (Section 14(c) of the Technical Amendments Act of 1958 (App. 68):

> *Statute of Limitations, etc.; interest.*—If refund or credit of any overpayment resulting from the application of the amendment made by subsection (a) or (b) is prevented on the date of the enactment of this Act, or within 6 months after such date, by the operation of any law or rule of law (other than section 3760 of the Internal Revenue Code of 1939 or section 7121 of the Internal Revenue Code of 1954, relating to closing agreements, and other than section 3761 of the Internal Revenue Code of 1939 or section 7122 of the Internal Revenue Code of 1954, relating to compromises), refund or credit of such overpayment may, neverthe-

> less, be made or allowed if claim therefor is filed within 6 months after such date. No interest shall be paid or allowed on any overpayment resulting from the application of the amendment made by subsection (a) or (b).

The phrase "operation of any law or rule of law," which appears in all the statutes in Category I (and several in Categories II and IV) refers not only to the statute of limitations, but also to such other matters as *res judicata*, estoppel, and closing agreement.[12]

Category II contains a single measure which, like those in Category I, created a new and retroactive rule of substantive law. However, it extended to seven years the normal limitations period measured from the filing of the return, instead of creating a new

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[12] The meaning of the phrase, which appears also in Section 1311 of the Internal Revenue Code of 1954 dealing with mitigation of the effect of limitations, is explained by the regulations under that provision (Treas. Reg. Sec. 1.1311(a)-2) as follows:

"Section 1311 provides for the correction of the effect of certain errors * * * when one or more provisions of law, such as the statute of limitations, would otherwise prevent such correction. * * * Examples of provisions preventing such corrections are sections 6501, 6511, 6532, and 6901 (c), (d) and (e), relating to periods of limitations; section 6212(c) and 6512 relating to the effect of petition to the Tax Court of the United States on further deficiency letters and on credits or refunds; section 7121 relating to closing agreements; and sections 6401 and 6514 relating to payments, refunds, or credits after the period of limitations has expired. Section 1311 may also be applied to correct the effect of an error if, on the date of the determination, correction of the error is prevented by the operation of any rule of law, such as *res judicata* or *estoppel*."
See also H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 85, 291; S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 116, 447.

limitations period measured from the date of enactment.

Category III is a group of nine dissimilar measures which made no change in the substantive statutory law but extended for varying periods (none longer than one year from the date of enactment) the time for filing a claim or a suit for refund. In most cases, the purpose of the provisions was to grant taxpayers (or some specific taxpayers) an additional period of grace within which to take advantage of some favorable event occurring subsequent to, or near the end of, the regular limitations period, *e.g.*, an earlier retroactive relief statute (Act of August 1, 1956, App. 92), a new Treasury Regulation (Section 96 of the Technical Amendments Act of 1958, App. 96); a Supreme Court decision (Section 98 of the Technical Amendments Act of 1958, App. 97) or a renegotiation agreement (Act of September 16, 1959, App. 98).

Category IV includes thirteen measures, each of which allowed taxpayers to make an election which would determine the tax treatment of certain items for specified past years, as to some of which the statute of limitations would normally have run. These statutes differ from those in Category III in that they prescribe a rule of substantive law; they differ from those in Categories I and V in that the rule they prescribe is to become operative only if the taxpayer so elects. Eight of the provisions extended the time (both for filing refund claims and for assessing deficiencies) for periods ranging up to one

year (measured from the date of election, the date of publication of final regulations, or the date of enactment); one extended the period only for assessments and another only for refunds; one, the Retirement-Straight Line Adjustment Act of 1958 (Section 94 of the Technical Amendments Act of 1958), made no provision for lifting the bar of limitations, and the question whether it did so by implication now awaits decision by the Court of Claims. *New York, Chicago and St. Louis Railroad Co.* v. *United States* (C. Cls. No. 385-61). The remaining two statutes in this category merely extended the period for making an election under a prior retroactive measure: in one instance the prior statute had granted a one-year grace period from the date of election for claiming refunds and making assessments; the other had not.

Category V contains fifteen provisions which, like Section 117(q), (a) amended or added to the statutory substantive law applicable to normally barred years but (b) contained no provision extending the limitations period.

The conclusion compelled by this pattern of varied and discriminating solutions is that when Congress intended to permit years otherwise barred by limitations to be reopened, it gave express permission. It is equally plain that where Congress did not see fit to provide a special grace period, it did not mean its silence to be construed by the courts as a license to abandon the normal limitations provisions in favor of a judicial rule based upon the artifice of a constructive overpayment and applicable indiscriminately to every retroactive measure. The anomalous effect

of such a judicial rule—the rule adopted by the court below—is that those provisions which specifically give the taxpayer an additional grace period of one year or less would actually operate to shorten the time that otherwise would be available for claiming a refund, and taxpayers for whom Congress made no provision for extending the statute would be treated more favorably than those for whom such provision was expressly made. It is evident that the express provisions extending the limitations period (see *supra*, p. 17) had no such restrictive purpose. With but two exceptions, both of them readily explained (see Section 207 of the Technical Changes Act of 1953, App. 74–77; Section 2 of the Act of June 29, 1956, App. 82–83, discussed at pp. 31–34, *infra*), they are cast in the language of grant, not reservation, and virtually proclaim on their face a purpose to open a door that would otherwise be closed.

2. *The Legislative Histories of Retroactive Measures*

a. Statutes containing no limitations provision

In a number of instances, the legislative history of provisions containing no special limtations provision shows conclusively that Congress did not intend to reopen barred years. The following three examples are illustrative:[13]

(i) Section 1 of the Act of August 9, 1955, 69 Stat. 625 (H.R. 7148), amended Section 25(b)(3) of the 1939 Code to permit, in certain cases, a taxpayer to

[13] See also Sec. 3 of the Act of July 14, 1952, 66 Stat. 629 (App. 125–127).

claim as a dependent under the 1939 Code a child born to him or legally adopted in the Philippine Islands. (See App. 143). Though the measure made a clear retroactive change in the law for "taxable years beginning after December 31, 1946," it contained no provision extending the period for filing claims. And the committee reports stated explicitly that barred years were not to be reopened (H. Rep. No. 1293, 84th Cong., 1st Sess., p. 2 (1955-2 Cum. Bull. 888); S. Rep. No. 1148, 84th Cong., 1st Sess. (1955-2 Cum. Bull. 889)):

> This provision applies to all taxable years beginning after December 31, 1946, to which the Internal Revenue Code of 1939 applies. However, the bill does not open up years with respect to which the statute of limitations has run.

This statement is particularly significant, in light of the fact that H.R. 7148 was enacted by the same Congress which enacted Section 117(q).

(ii) A similar statement was made on the Senate floor by Senator Harry Byrd, Chairman of the Finance Committee, in connection with H.R. 5938, which became the Act of February 11, 1958, P.L. 85-318, 72 Stat. 3 (discussed App. 134-137). That measure amended Section 812(e)(1)(D) of the 1939 Code so as to qualify for the marital deduction certain terminable interests in the case of decedents dying after April 2, 1948, who were adjudged incompetent before that date and never regained competency. The 1958 amendment created an entirely new right, was applicable to years normally barred, and did not pro-

vide for an extension of the limitation period. Yet Senator Byrd, in presenting the bill for a vote, made it plain that no extension was contemplated (104 Cong. Rec., Part 1, p. 1049):

> This bill will be applicable only in the case of individuals who, first, became incompetent before April 2, 1948, and did not regain competency before their deaths; second, who died between April 2, 1948, and August 16, 1954; and *third, whose estate tax returns are not closed to further assessment or refund as of the date of enactment of this act.* [Emphasis supplied.]

(iii) Even more significant was a statement made on the House floor by Congressman Wilbur Mills, Chairman of the Ways and Means Committee, during the consideration of H.R. 6482, a bill passed by the House and Senate in 1960 but vetoed by the President.[14] That proposal would have permitted successor corporations created by certain types of reorganization to elect to claim a credit in computing federal employment taxes for amounts paid to the State by a predecessor corporation, and was to apply retroactively to taxable years beginning after December 31, 1950 (105 Cong. Rec., Part 14, p. 18824). Normally the calendar years 1951–1955 would have been closed for most taxpayers by 1960, yet nothing was said in the bill about extending or not extending the period of limitations for refund claims. However, the re-

[14] The bill was apparently vetoed because of its retroactive feature. 106 Cong. Rec., Part 9, p. 11822. Essentially the same bill was passed as Section 1 of P.L. 87–321, Act of September 26, 1961, 75 Stat. 683, but applied prospectively only.

port of the Ways and Means Committee (H. Rep. No. 1058, 86th Cong., 1st Sess., p. 4) stated expressly and unequivocally the rule of construction which in our view governs the present case:[18]

> However, since the effective date provision does not refer to the period of limitation for claiming credit for [sic] refund, this provision does not have the effect of reopening such period in any case in which the period has expired.

The same point was made by Congressman Mills, explaining the bill on the floor of the House (106 Cong. Rec., Part 8, p. 10713):

> The amendments contained in H.R. 6482 will apply to calendar years beginning after 1950. Since the effective date provision does not refer to a period of limitations for claiming credit or refund, no refunds or credits will be allowed where the calendar year involved is closed by the running of the statute of limitations.

There is no more reason to read an implied extension of the limitations period into Section 117(q) than to read one into H.R. 7148, H.R. 5938 or H.R. 6482. Indeed, in terms of the Court of Claims' rationale, there is even less reason, for those bills, unlike Section 117(q), created new rights wholly unforeshadowed by prior law. Yet it is clear from the committee reports and the statements of Senator Byrd and Congressman Mills that in enacting H.R. 7148, H.R. 5938 and H.R. 6482 Congress had no intention

[18] The report of the Senate Committee (S. Rep. No. 1276, 86th Cong., 2d Sess., p. 3) states the rule in substantially the same terms.

of reopening barred years and did not deem it necessary to encumber the statute with an express disavowal. The same conclusion, we submit, holds for Section 117(q).

There are, we should point out, three retroactive statutes, all of the elective variety, in which Congress expressly confined the substantive scope of the election to taxable years that were open as of the date of enactment. All three were enacted in the aftermath of this Court's decision in *United States* v. *Cannelton Sewer Pipe Co.*, 364 U.S. 76 (1960), and each of them, with respect to a particular mineral and for past years only, provided a compromise legislative solution to the problem which this Court had resolved adversely to the taxpayer in *Cannelton* (*i.e.*, what is the "cut-off" point at which the mining process comes to an end and the value of the mineral—its base for percentage depletion—is computed?).[18] Because

[18] In *Cannelton* (decided on June 27, 1960), the Court held, in substance, that "gross income from mining", the base against which the statutory depletion rate is applied, is the market value of the raw mineral product after completion of those "ordinary treatment processes" needed to make it marketable, not the value of the product fabricated from that mineral.

Section 4 of the Act of September 14, 1960, P.L. 86–781, 74 Stat. 1018 dealt with calcium carbonates and other minerals used in making cement. It provided that, at the taxpayer's election, the "cut-off" point established prospectively by Section 302 of the Public Debt and Tax Rate Extension Act of 1960, 74 Stat. 291–293 (just prior to the introduction of the kiln feed into the kiln) would apply retroactively to years still open. See Conf. Rep. No. 2213, 86th Cong., 2d Sess. (1960–2 Cum. Bull. 904).

The Act of September 26, 1961, P.L. 87–312, 75 Stat. 674, dealt (as had *Cannelton*) with brick and tile clay. It pro-

these provisions do not in substantive terms purport to reach barred years, we have not included them in our compilation of retroactive relief measures. In our view, of course, it is not ordinarily necessary for Congress to specify that a taxpayer's election entitles him to refunds only for open years, since the limitations bar would not in any case be lifted. Since these particular statutes, however, also expressly provided that the statute of limitations would not expire prior to one year after the deadline for the taxpayer's election, Congress may have wished to dispel any possible inference that this extension would permit assessments (or, where pertinent, refund claims) for years already barred on the date of enactment. Moreover, since it was the assessment of deficiencies, rather than the claiming of refunds, which in most cases was involved, Congress may have wished to make doubly sure that the taxpayer's election (reducing the amount of the deficiencies) would not be construed as a waiver of the statute of limitations. Be that as it may, we are not

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vided that, at the taxpayer's election, the depletion base, for past years still open, would be equal to 50% of the price for which the end products were sold during the year (not to exceed $12.50 per ton of clay or shale used in the fabrication). See H. Rep. No. 939, 87th Cong., 1st Sess. (1961–2 Cum. Bull. 425); S. Rep. No. 906, 87th Cong., 1st Sess. (1961–2 Cum. Bull. 429).

Section 2 of the Act of September 26, 1961, P.L. 87–321, 75 Stat. 683 dealt with quartzite and clay used by the mine owner in producing refractory products. It provided that, at the taxpayer's election, the depletion base should be 37½% of the lesser of the average lowest published price or the average lowest selling price at which the crushed ground mineral products are sold during the year. See S. Rep. No. 868, 87th Cong., 1st Sess., pp. 2, 6–8 (1961–2 Cum. Bull. 447, 448, 451–452).

aware of any instance in which Congress, having made its retroactive statute applicable to years ordinarily barred (as it did in Section 117(q)), then deemed it necessary to spell out its assumption that the normal limitations provisions would continue to apply.[17]

b. Statutes Expressly Extending the Limitations Period

Further confirmation comes from the legislative history of those provisions which grant an additional

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[17] Neither Section 37 of the Technical Amendments Act of 1958, 72 Stat. 1606, 1633 (App. 106) nor the Dealer Reserve Income Adjustment Act of 1960, 74 Stat. 124 (App. 109) is to the contrary. The 1958 statute (a) allowed the taxpayer to make an election at any time prior to the first day of the first month beginning more than 90 days after the date of publication of final regulations; (b) provided that the statute of limitations for deficiencies and refunds would not expire prior to one year from that date; and (c) stated that the preceding provision extending the limitations period should not apply to any year barred as of the date of enactment. In that case it was necessary to provide expressly in (c) that barred years would not be reopened because (b), standing alone, would have had the effect of reopening them.

The Dealer Reserve Income Adjustment Act provided, in subsection 5(e), that if any assessment or refund was not barred on June 21, 1959 (the eve of this Court's decision in *Commissioner v. Hansen*, 360 U.S. 446), the limitations period for such assessment or refund should not expire prior to September 1, 1961 (one year after the deadline for the taxpayer's election under the Act). Here too it was obviously essential to state explicitly that the extension of the limitation period would not reopen years barred as of a designated date. Moreover, the crucial date in this case was not the date of enactment (May 13, 1960), but a prior date (June 21, 1959), and the extension provision did have the effect of reopening years which had become barred during the interim between the two dates. This unusual result could not have been achieved except by express provision.

period of six months or one year within which to file refund claims. This history shows that when Congress creates such special grace periods, it does so on the assumption that, but for them, barred years would not be reopened. Although a number of examples might be given,[19] we shall confine ourselves to the following three:

(i) Section 14 of the Technical Amendments Act of 1958 prescribes certain rules in computing net operating loss deductions for taxable years beginning in 1953 and ending in 1954 (see App. 67). As passed by the House, the amendment said nothing about limitations, but a provision granting a six-month grace period was added by the Senate. The reason for the change was explained by the Senate Finance Committee as follows (S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 23-24):

> Your committee did amend the House provision, however, in one respect because 3 years have now elapsed since 1954 and many of the transitional years with which this provision is concerned are now closed years. To prevent relief from being denied in such cases, your committee amends this provision to provide that if a refund or credit with respect to this provision is prevented on the date of enactment of this bill or within 6 months after that

[19] See *e.g.*, Act of August 1, 1956, 70 Stat. 917 (App. 92); Secs. 29, 36, 37, 92 and 93 of the Technical Amendments Act of 1958, 72 Stat. 1606 (App. 105, 116, 106, 69, 77); Dealer Reserve Income Adjustment Act of 1960, 74 Stat. 124 (App. 109); Sec. 23 of the Revenue Act of 1962, 76 Stat. 960, 1065 (App. 112); Sec. 1 of the Act of October 23, 1962, 76 Stat. 1158 (App. 114).

time by the operation of any law or rule of law (except closing agreements or compromises) refund or credit, nevertheless, is to be allowed if the claim is filed within 6 months of the date of enactment of this bill. * * *

(ii) The Act of August 9, 1955, P.L. 310, 69 Stat. 607 (App. 91), provided a one-year grace period for filing otherwise barred refund claims based on Section 345 of the Revenue Act of 1951, 65 Stat. 452, 517. The latter statute, itself a retroative relief measure applicable to taxable years ending on or after December 7, 1941, allowed a refund or credit for taxes paid on trust income which had been accumulated for members of the Armed Services dying in active service during World War II; but, although it created a new right, it contained no language extending the period of limitations. The premise of the 1955 measure, as the accompanying committee reports explained,[19] was that the 1951 Act had provided "[n]o relief * * * for cases where refunds or credits were barred by the expiration of the period of limitations, by prior court decisions, or for other similar reasons"; to correct this "oversight" it was apparently thought necessary to enact further legislation. If that was true in the case of the 1951 statute, it is equally true in the case of Section 117(q), for the two were entirely comparable in their retroactive effect. What is more, the bill which added Section 117(q) was discussed on the House floor by the Chairman of the Ways and Means

[19] H. Rep. No. 1438, 84th Cong., 1st Sess., pp. 1–2 (1955–2 Cum. Bull. 846); S. Rep. No. 1243, 84th Cong., 1st Sess., p. 1 (1955–2 Cum. Bull. 846–847).

Committee (on August 1, 1955; 101 Cong. Rec., Part 10, pp. 12708–12709) only five days after he had explained the purpose of P.L. 310 and in so doing construed the 1951 Act as not extending the period of limitations (July 27, 1955; 101 Cong. Rec., Part 9, p. 11685).

(iii) More striking evidence is provided by Section 2 of the Act of June 29, 1956, P.L. 629 (App. 47–48, 82–83)—the very same enactment which, in Section 1, added Section 117(q) to the 1939 Code. As passed by the House, H.R. 6143 (which became P.L. 629) contained only Section 1, the provision relating to the taxation of patent royalties. (101 Cong. Rec., Part 10, p. 12708). The Senate added five other sections, including Section 2—which related to taxation of certain payments received prior to 1950 from the United States for construction of installations or facilities for the Armed Services and was made applicable to "taxable years ending after December 31, 1948"—and Section 3, which provided that the amount taxable as a dividend on the distribution of appreciated property could not exceed the earnings and profits of the distributing corporation and was made effective "as if it were part of [Section 115(n)] on the date of enactment of the Internal Revenue Code of 1939." Thus, as passed by the Senate, the three retroactive amendments, all reaching back to normally barred years, were substantially similar in form. The Conference Committee, however, without changing Sections 1 or 3 of the bill, added the following italicized language to subsection (b) of Section 2:

The amendment made by this section shall apply with respect to taxable years ending after December 31, 1948, *notwithstanding the operation of any law or rule of law (other than section 3760 of the Internal Revenue Code of 1939 or section 7121 of the Internal Revenue Code of 1954, relating to closing agreement, and other than section 3761 of the Internal Revenue Code of 1939 or section 7122 of the Internal Revenue Code of 1954, relating to compromises). Notwithstanding the preceding sentence, no claim for credit or refund of any overpayment resulting from the amendment made by this section shall be allowed or made after the period of limitation applicable to such overpayment, except that such period shall not expire before the expiration of one year after the date of the enactment of this Act.* [Emphasis added.]

It was in this form that subsection (b) was enacted. The explanation for the change, the effect of which was to grant an additional year for filing refund claims, undoubtedly lies in the fact that Section 2 was enacted for the benefit of a particular taxpayer, one Leo Sanders, who had unsuccessfully litigated this issue in the Tax Court and the court of appeals and hence would have been barred both because of the prior litigation and the statute of limitations.[29] The Conference Committee apparently recognized that the

[29] See Surrey, *The Congress and The Tax Lobbyist—How Special Tax Provisions Get Enacted*, 70 Harv. L. Rev. 1145, 1148, n. 4(b), in which the author points out that this amendment fits precisely the facts involved in *Sanders v. Commissioner*, 225 F. 2d 629 (C.A. 10th), certiorari denied, 350 U.S. 967. Taxpayer's petition for certiorari was denied on February 27, 1956, approximately four months before Public Law 629 was enacted.

original Section 2, like its two sister sections, left those barriers standing; to remove them, it added the phrase "notwithstanding the operation of any law or rule of law" to the first sentence of subsection (b), *supra*, and then, in order to impose a new time limit, added the entire second sentence. If the theory of the court below were correct, the first sentence, in its original form as passed by the Senate, would itself have lifted the limitations bar, and the italicized addendum would have been wholly superfluous. It is noteworthy, moreover, that the second sentence of subsection (b) is, with one other exception, the only one-year limitation provision enacted during the period 1953–1962 which is cast in the form of a reservation, rather than a grant. The reason, obviously, is that since Congress had expressly lifted the bar of limitations by its addition of the "notwithstanding" phrase to the first sentence, the one-year provision did, in this exceptional instance, operate to cut down rather than extend the time otherwise available for filing.

C. TO GIVE SUCH SUBSTANTIVE AMENDMENTS ONLY SUBSTANTIVE EFFECT ACCOMPLISHES SUBSTANTIAL LEGISLATIVE PURPOSES

The decision below rested, in part, upon the view that unless Congress intended to extend the limitations period, it was "an idle gesture" to have made Section 117(q) applicable to years ordinarily barred (R. 14). That reasoning, however—which also underlay the Second Circuit's decision in *Hollander* v. *United States*, 248 F. 2d 247, upon which the court below relied—misconceives the character of retroactive changes in substantive tax legislation and of Sec-

tion 117(q) in particular. As a general matter, such "special" tax legislation is often enacted (a) to settle an outstanding controversy without litigation or (b) to remedy a specific case of hardship which has come to the attention of Congress—purposes which do not require a renewal of the limitations period.[21] See Surrey, *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted,* 70 Harv. L. Rev. 1145 (1957); Cary, *Pressure Groups and the Revenue Code: A Requiem in Honor of the Departing Uniformity of the Tax Laws,* 68 Harv. L. Rev. 745 (1955).

Section 117(q) is a prime example of a statute aimed at putting to rest a live controversy and thereby relieving existing refund claimants of the need to battle their way through the courts. Congress was aware that many taxpayers who had filed timely refund claims for years beginning after May 31, 1950, were faced with burdensome litigation as a result of the Commissioner's refusal to extend to them the capital gains treatment which most of the

[21] An example of retroactive legislation passed for the benefit of a specific taxpayer who needed no modification of the normal limitations provisions to benefit from its terms is the so-called "Westinghouse amendment" (App. 139).

In the following cases, however, Congress, in enacting retroactive legislation primarily intended to benefit a specific individual or group, reopened the limitations period for filing refund claims: Sec. 2 of the Act of June 29, 1956, 70 Stat. 404 (the Act involved in this case—see *infra,* and App. 82); Sec. 100 of the Technical Amendments Act of 1958, 72 Stat. 1606, 1673, App. 83; Sec. 2 of the Act of September 16, 1959, 73 Stat. 563, App. 98; Sec. 5 of the Act of September 14, 1960, 74 Stat. 1010, 1013, App. 72; and Sec. 26 of the Revenue Act of 1962, 76 Stat. 960, 1067 (App. 78).

courts had approved. The purpose of the Act was explained on the House floor by Chairman Cooper of the House Ways and Means Committee (101 Cong. Rec., pt. 10, pp. 12706–12709):

> The relief provided by section 1235 is available only with respect to amounts received in any taxable year to which the 1954 Code applies. As a result of this and the announced policy of the Internal Revenue Service to continue its insistence on its position for years beginning after May 31, 1950, and prior to effective date of the 1954 Code taxpayers are still confronted with litigation for taxable years falling in this period in order to secure the rights to which the courts, with practical unanimity, have held they are entitled.
>
> H.R. 6143 eliminates the necessity for such litigation by making the provisions of the 1954 Code available to years beginning after May 31, 1950.

Although the legislative history contains no specific reference to the limitations problem as such, there is no reason to believe that Congress meant to do more than have Section 117(q) perform the same function as a decision of this Court, which resolves the dispute between the parties before it and furnishes a precedent for actual or potential litigation, but affords no benefit whatever to similarly situated persons whose right to sue has expired. Cf. *Kavanagh* v. *Noble*, 332 U.S. 535, rehearing denied, 333 U.S. 850. The only purpose announced by the committee, as we have said, was to relieve taxpayers facing litigation; and certainly the enactment had this effect. A number of cases pending at the time Section 117(q)

was enacted were subsequently settled by the payment of a full refund,[22] or by the dismissal of a governmental appeal.[23] Still other pending cases might have been disposed of by the statute but for (a) a controversy as to its applicability or (b) the presence of other issues in the case.[24] Finally, while

[22] Among the cases pending when Section 117(q) was enacted which were subsequently settled by the Justice Department on the basis of that enactment by the making of a full refund, are the following: *Goff* v. *United States*, C. Cls. No. 252–56, years 1951–1954; *Ozai-Durrani* v. *United States*, C. Cls. No. 125–57, years 1951–1953; *A. M. Hunt* v. *United States*, N.D. Ohio, No. 33687, years 1951–1952; *J. P. Hunt* v. *United States*, N.D. Ohio, No. 33688, years 1951–1952; *J. H. Hunt* v. *United States*, N.D. Ohio, No. 33689, years 1951–1952; *G. L. Hunt* v. *United States*, N.D. Ohio, No. 33690, years 1951–1952; *C. F. Hunt* v. *United States*, N.D. Ohio, No. 33691, years 1951–1952; *Hathaway* v. *United States*, C. Cls. No. 342–55, year 1951; *Hassler* v. *United States*, N.D. Calif. No. 7359, years 1951–1953; *Garraway* v. *Manning & Lambert*, N.J. No. 840–55, years 1951–1952; *Dalton* v. *United States*, C. Cls. No. 295–56, year 1951; *Briskman* v. *United States*, S.D.N.Y., No. 103–290, years 1951–1952; *Cline* v. *United States*, S.D. Calif., No. 10–58–T, year 1951; *Schlens* v. *United States*, N.D. Ill., No. 57–C–264, year 1951.

[23] Government appeals pending in the following cases, among others, were dismissed. *King* v. *United States*, S.D. Texas, No. 8316, years 1950–1951; *Beeth* v. *United States*, S.D. Texas, No. 8399, years 1950–1952; *Waterson* v. *United States*, N.D. Texas, No. 308, years 1951–1953; *Commissioner* v. *Hudson*, T.C. No. 58726, years 1951–1952.

[24] Some of these cases were eventually settled: *Jeanne Cherry* v. *United States*, N.D. Calif., No. 34570, years 1951–1953, stipulation for dismissal filed August 22, 1958; *Frederick C. Embshoff and Agnes C. Embshoff* v. *United States*, S.D. Calif., Civ. No. 658–58, years 1951–1953, stipulation for dismissal filed November 2, 1959; *Robert D. Henderson and Pauline Henderson* v. *United States*, C. Cls., No. 514–56, years 1952–1953, stipulation for dismissal filed December 4, 1957; *Joseph H. Hoern*

the government has not attempted a compilation of the cases which were pending in the Tax Court or before the Internal Revenue Service when Section 117(q) was enacted and which were subsequently settled on the basis of that legislation, it is safe to assume that they were numerous.[35] Plainly, a statute which achieves these results cannot be considered "an

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and Gladys Hoorn and Carl E. Dilts and Frances M. Dilts v. *United States*, E.D. Mich., Civ. No. 1931, years 1952–1954, order for dismissal filed March 23, 1959; *Adolph and Hilder M. C. Ronning* v. *United States*, Minn., Civ. Nos. 4-58-327 and 4-58-73, years 1950–1953, stipulations for dismissal filed February 3, 1961 (the *Ronning* cases were the only cases in this group involving a limitations issue—it was there involved for 1951 and 1952 only); *Orla E. Watson and Edith Watson* v. *United States*, Kans., Civ. No. KC-752, year 1952, order for dismissal filed June 20, 1957.

Other cases had to be litigated; *e.g.*, *Lawrence* v. *United States*, 242 F. 2d 542 (C.A. 5th), years 1951–1953, decided in 1957; *Storm* v. *United States*, 243 F. 2d 708 (C.A. 5th), years 1949–1952, decided in 1957; *Watkins* v. *United States*, 252 F. 2d 722 (C.A. 2d), certiorari denied, 357 U.S. 936, years 1949–1952, certiorari denied in 1958; *Bannister* v. *United States*, 262 F. 2d 175 (C.A. 5th), reversing and remanding 161 F. Supp. 298 (S.D. Tex.), years 1949–1951, decided by the Court of Appeals in 1958; *Schmitt* v. *Commissioner*, 271 F. 2d 301 (C.A. 9th), years 1949–1951, decided in 1959; *Gruber* v. *United States*, 158 F. Supp. 510 (D. Ore.), reversed and remanded *sub nom.* *Mayer* v. *United States*, 285 F. 2d 683 (C.A. 9th), years 1950–1952, decided by the Court of Appeals in 1960; *Flanders* v. *United States*, 172 F. Supp. 935 (N.D. Calif.), years 1951–1953, decided in 1959.

[35] Despite the Commissioner's reversal of position in May, 1950, many, if not most, taxpayers were undoubtedly advised to continue reporting royalties received in the calendar years 1951–1952 as capital gains and, if deficiencies were assessed, to file petitions in the Tax Court, which had already decided the issue in taxpayers' favor. Many of those cases must have been pending as of the date of enactment.

idle gesture" merely because it does not reopen barred years.

In many other cases, the purpose of a retroactive amendment is not to establish a rule of general application, but to provide relief in a particular case of hardship which has been brought to the notice of Congress. See Surrey, *op. cit., supra,* at p. 1157. Where the party aggrieved has kept open his taxable years, as is often the case, Congress can achieve its end without extending an additional grace period to less vigilant or less persistent taxpayers who have allowed their claims to lapse. A case in point is the statute involved in *Hollander* itself, Section 607 of the Revenue Act of 1951, 65 Stat. 452, 567, an amendment giving retroactive relief to the estates of certain decedents dying between March 18, 1937, and February 11, 1939. A majority of the court (Judge Clark dissenting) held that Section 607 must be construed to remove the limitations bar, since it would otherwise be a dead letter. 248 F. 2d 250–251. What was apparently not called to the court's attention, however, was that the amendment was enacted in response to a request by the Washington attorney for a particular estate (that of Eleanor Rice) which had filed a timely refund claim and had a timely refund suit pending at the time of enactment (*Alexander Hamilton Rice, et al.* v. *Broderick,* Civ. No. 632 (D.C.R.I.). The circumstances under which Section 607 came to be enacted—circumstances which are doubtless paralleled in the case of other retroactive statutes—are sharply detailed in the brief filed by the

plaintiff in the *Rice* case in December, 1952 (pp. 8-9):

> The records of Congress and of its appropriate committees and members will show that this legislation was initiated and pressed to enactment at the sole instance of duly registered legislative counsel for this estate. The record will show that Williams, Myers & Quiggle of Washington, D.C., registered in this capacity on January 6, 1950. On that date, and quarterly thereafter, they filed Form B with the Secretary of the Senate and the Clerk of the House of Representatives which disclosed that they were seeking legislation leading to the allowance of the very claim for refund now in question. It is a further fact that Paul F. Myers, Esquire, of the firm of Williams, Myers, & Quiggle, took the case up specifically with the Chairman of the Senate Finance Committee on a number of occasions who referred the matter to the chief of the staff of the Joint Committee on Internal Revenue Taxation. The matter was pursued with the chief of staff who suggested the very language which was then introduced by a member of the Senate Finance Committee at the request of registered counsel for the plaintiffs, two of whom are that member's constituents. In the exact form so introduced the provision was enacted as Section 607 of the Revenue Act of 1951.

Had the Second Circuit been made aware of these facts, the court might well have recognized that it was unnecessary to read into the amendment a re-

pealer of the statute of limitations in order to give effect to the Congressional purpose.

While the legislative history of Section 117(q) happens to disclose the reasons why Congress might not have seen fit to reopen barred years, we are not suggesting that the limitations question should depend in each instance upon whether the court is able to piece out such reasons from the history and surrounding circumstances of the particular statute involved. On the contrary, since the legislative history of a great many retroactive tax measures reveals that the discoverable purposes of the enactment can be fully effectuated without reviving barred claims, and since Congress has repeatedly demonstrated its ability to extend additional time when it wishes to do so, the courts should have no hesitation in accepting at face value a substantive amendment which in terms does not affect the express procedural rules embodied in limitations provisions. Because of the *ad hoc* character of retroactive tax legislation, it is sometimes almost impossible to determine whether, in a particular case, the failure to remove the limitations bar was inadvertent or deliberate. And even if inadvertence be diagnosed, there is less justification here than in other areas for the courts to undertake the cure. Congress can easily correct any oversight in one retroactive statute by enacting another, and indeed has done so.[26]

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[26] Act of August 9, 1955, P.L. 310, 69 Stat. 607 (App. 91); Act of August 1, 1956, 70 Stat. 917 (App. 92).

D. THE GAPS LEFT TO BE FILLED BY JUDICIAL INVENTION IF A PURELY SUBSTANTIVE AMENDMENT IS HELD TO AFFECT BY IMPLICATION THE PERIOD OF LIMITATIONS SHOW THAT NO SUCH INFERENCE IS WARRANTED

The prescription of time limitations is and always has been the province of the legislator, not the judge; the mechanical and arbitrary rules involved in that task cannot readily be fashioned by the techniques upon which courts must rely. This is not only a reason for being slow to assume the function, but a fact so obvious as to indicate that if Congress had intended a departure from the general statutory rule it would have followed the familiar course of providing a statutory substitute.

The difficulties awaiting a court which ventures into this area are illustrated by the instant case. Assuming that the enactment of a retroactive statute does set in motion a new limitations period, what should that period be? The Court of Claims has selected a two-year period (in the case of income tax) on the theory that the enactment gave rise to a constructive "payment" of tax. But it might also have chosen another term, *e.g.,* three years, the minimum allowed the taxpayer under Section 322(b) after filing his return; six years, the general limitations period provided for suits against the government (28 U.S.C. 2401)—this on the theory that the retroactive measure impliedly repealed Section 322(b)(1); or six months or one year, the grace period customarily granted by Congress when it expressly reopens barred years (see, *supra,* p. 17). It is noteworthy that the two-year solution which the court hit upon is one

which Congress, so far as we know, has never seen fit to adopt in any retroactive tax measure.

There are still further questions. Is a new limitations period set in motion by any retroactive statute, or only by one which reaches back to years that would normally be barred? If the latter, does the new period apply with respect to all claims covered by the substantive terms of the retroactive amendment, or only to those claims and/or taxable years which are barred as of the date of enactment? Must the government pay interest on the sums eventually refunded, and, if so, for what period? Such questions as these, we submit, so patently demand legislative solutions that the failure of Congress to provide them implies that no waiver of the existing rule was intended.

E. IT IS IRRELEVANT WHETHER THE AMENDMENT "CREATES NEW RIGHTS" OR MERELY "CONFIRMS EXISTING RIGHTS"

The court below laid considerable stress on the fact that Section 117(q) gave the taxpayer "a right that he had not had before," or at least "a right which the agency charged with the administration of the prior law said he did not have." 280 F. 2d at 831. In *Tobin* v. *United States*, 264 F. 2d 845, on the other hand, the Fifth Circuit decided the limitations question adversely to the taxpayer on the ground that Section 117(q) "did not establish, it merely confirmed, the already existing right to seek a timely refund." Both courts appear to accept the premise (in the case of the Fifth Circuit, perhaps only *arguendo*) that if a taxpayer had no legal right to a refund under prior law,

it ought not be held against him that he failed to file a timely claim. In our view, however, the distinction between "right-creating" and "right-confirming" statutes ought not to be decisive of the limitations question.

The distinction between the two categories of statutes was defined by the Fifth Circuit and by the Court of Claims in somewhat different terms. In the eyes of the court below, an amendment such as Section 117 (q), even though in harmony with prior case law, nonetheless creates a new right if it overrules the position of the Commissioner.[37] On that view, however, the right-creating category would embrace virtually all retroactive legislation, since it is only when the Commissioner's view is at odds with that of a taxpayer that there is occasion for a legislative remedy.

The Fifth Circuit, on the other hand, would apparently characterize a statute as creating a right only if it modified prior law as declared by the courts.

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[37] In this, the rationale of the court below in *Zacks* is apparently contrary to its rationale in *Pitcairn Co.* v. *United States*, 180 F. Supp. 582. There the court held that since the Act of January 28, 1956 (App. 129) was enacted to overrule a prior revenue ruling which the court held to be invalid, the taxpayer would have been entitled to a refund irrespective of that statute. Accordingly, the taxpayer was allowed to recover interest notwithstanding a provision in the Act prohibiting the payment of interest "on any overpayment resulting from" the amendment. A similar rationale was applied, with respect to the prohibition on interest in another retroactive statute, in *Wabash Railroad Co.* v. *United States*, 164 F. Supp. 226 (C. Cls.), subsequently overruled with respect to its construction of the prior law in *Wisconsin Central Railroad Co.* v. *United States*, 296 F. 2d 750 (C. Cls.), certiorari denied, 369 U.S. 885.

That test has more to recommend it, since it recognizes that a taxpayer who has every reason to expect that the courts will uphold his position can scarcely excuse his failure to file a timely refund claim on the ground that the Commisioner would have contested it. However, the Fifth Circuit's criterion has infirmities of its own. In order to determine whether a retroactive statute modifies or merely codifies existing law, a court would in many cases be forced to make a difficult judgment as to what the prior law was—*i.e.*, to adjudicate the very controversy which the statute was intended to set at rest without litigation. Furthermore, in those cases where the prior law is sufficiently in doubt to make the taxpayer's claim a colorable one, the "equitable" argument for granting a new limitations period is, even in its own terms, highly attenuated.

These objections might be met by treating as right-creating statutes only those which make a clear break with prior law and not those which clarify obscurities or resolve disputed issues. Even in that form, however, the classification would still not be an appropriate basis on which to decide the limitations question. The reasons are implicit in what we have already said. Many retroactive measures are intended solely to relieve the hardship of a particular taxpayer whose years are still open (*supra*, pp. 33, 37-38). Such legislation may or may not create new rights, but in either case the specialized purpose of the enactment can be accomplished without generating a new limitations period for other taxpayers, who, whatever the reason, have failed to press their claims. Moreover,

the distinction between right-creating and right-confirming statutes does not seem to be reflected in the actual practice of Congress in dealing with the limitations question. Several examples of the former category can be found both among the measures which expressly grant an additional grace period[38] and among those which do not.[39] And in some cases (*supra*, pp. 21–27), the legislative history clearly reveals that a statute which created new substantive rights was not intended to renew the period of limitations.

Even were it assumed that right-creating statutes do remove the limitations bar, that assumption would not assist the taxpayer here. Although characterizing the matter differently, the court below and the Fifth Circuit were in agreement that Section 117(q) merely confirmed to "non-professional" inventors[40] the right to capital-gain treatment which the courts, though not the Commissioner, had already

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[38] See, *e.g.*, Sec. 2 of the Act of June 29, 1956, 70 Stat. 404 (App. 82), Secs. 14, 36, 92 and 93 of the Technical Amendments Act of 1958, 72 Stat. 1606 (App. 67, 116, 69, 77).

[39] See, *e.g.*, Sec. 1 of the Act of August 9, 1955, 69 Stat. 625, App. 143; Act of February 11, 1958, 72 Stat. 3, App. 134; Act of February 11, 1958, 72 Stat. 4, App. 137; Act of August 7, 1959, 73 Stat. 288, App. 140.

[40] It is not clear from the record whether or not the patent involved here was held by Mrs. Zacks "primarily for sale to customers in the ordinary course of [her] trade or business." If not, she plainly cannot claim that *her* rights originated in Section 117(q). Compare *Lorenz* v. *United States*, 296 F. 2d 746, where the taxpayer was clearly a professional inventor. In our view, however, as will be apparent from the text, her status as a professional or non-professional inventor ought not be decisive of the limitations issue.

recognized. It is true that by making the same treatment available, with respect to patents held by the taxpayer primarily for sale to customers in the ordinary course of business, the amendment changed prior law. However, the benefit thus conferred upon "professional" inventors was a purely incidental feature of the enactment. The sole purpose of Section 117(q), as its legislative history shows, was to settle the outstanding controversy as to whether the transfer of a patent in exchange for periodic royalties qualified as a "sale or exchange." If the amendment happened also to liberalize the definition of a capital asset in a manner favorable to "professional inventors," it was only because Section 117(q) followed the language of Section 1235, the prospective statute enacted two years earlier.

CONCLUSION

For the reasons above given, the judgment of the Court of Claims should be reversed.

Respectfully submitted,

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APPENDIX A

Act of June 29, 1956, c. 464, 70 Stat. 404 (P.L. 629):

[SEC. 1.] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 117 of the Internal Revenue Code of 1939 (relating to capital gains and losses) is hereby amended by adding at the end thereof a new subsection as follows:

"(q) TRANSFER OF PATENT RIGHTS.—

"(1) GENERAL RULE.—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are—

"(A) payable periodically over a period generally coterminous with the transferee's use of the patent, or

"(B) contingent on the productivity, use, or disposition of the property transferred.

"(2) 'HOLDER' DEFINED.—For purposes of this subsection, the term 'holder' means—

"(A) any individual whose efforts created such property, or

"(B) any other individual who has acquired his interest in such property in exchange for consideration in money or money's worth paid to such creator prior to actual reduction to practice of the invention covered by the patent, if such individual is neither—

"(i) the employer of such creator, nor

"(ii) related to such creator (within the meaning of paragraph (3)).

"(3) EXCEPTIONS.—This subsection shall not apply to any transfer described in paragraph (1)—

"(A) by a nonresident alien individual, or

"(B) between an individual and any related person.

For purposes of this paragraph, the term 'related person' means a person, other than a brother or sister (whether of the whole or half blood), with respect to whom a loss resulting from the transfer would be disallowed under section 24 (b).

"(4) APPLICABILITY.—This subsection shall apply with respect to any amount received, or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred."

SEC. 2. CERTAIN CLAIMS AGAINST UNITED STATES.

(a) Section 106 of the Internal Revenue Code of 1939 (relating to claims against the United States involving acquisition of property) is hereby amended to read as follows:

"SEC. 106. CERTAIN CLAIMS AGAINST UNITED STATES.

"In the case of any amount (other than interest) received by a taxpayer from the United States with respect to a claim against the United States—

"(a) involving the acquisition of property and remaining unpaid for more than 15 years, or

"(b) arising under a contract for the construction of installations or facilities for any branch of the armed services of the United States and remaining unpaid for more than 5 years from the date such claim first accrued and paid prior to January 1, 1950,

the portion of the tax imposed by section 12 attributable to such amount (other than interest) shall not exceed 30 percent thereof. In applying section 291(a) (relating to additions to the tax for failure to file a return) in any case to which paragraph (b) of this section applies, the term 'reasonable cause' shall include the filing of a timely incomplete return under circumstances which led the taxpayer to believe that no tax was due on amounts received under a settlement with the United States."

(b) The amendment made by this section shall apply with respect to taxable years ending after December 31, 1948, notwithstanding the operation of any law or rule of law (other than section 3760 of the Internal Revenue Code of 1939 or section 7121 of the Internal Revenue Code of 1954, relating to closing agreements, and other than section 3761 of the Internal Revenue Code of 1939 or section 7122 of the Internal Revenue Code of 1954, relating to compromises). Notwithstanding the preceding sentence, no claim for credit or refund of any overpayment resulting from the amendment made by this section shall be allowed or made after the period of limitation applicable to such overpayment, except that such period shall not expire before the expiration of one year after the date of the enactment of this Act.

SEC. 3. CERTAIN DISTRIBUTIONS IN KIND.

(a) Section 115 of the Internal Revenue Code of 1939 (relating to distributions by corporations) is hereby amended by adding at the end thereof the following new subsection:

"(n) CERTAIN DISTRIBUTIONS IN KIND.—

"(1) Notwithstanding any other provision of this section, a distribution of property by a corporation to its stockholders, with respect to its stock, shall be (except as provided in paragraph (2)) considered to be a distribution which is not a dividend (whether or not otherwise a dividend) to the extent that the fair market value of such property exceeds the earnings and profits of such corporation accumulated after February 28, 1913, and the earnings and profits of

the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions, except those described in subparagraphs (A), (B), and (C) of paragraph (3), made during the taxable year) without regard to the amount of the earnings and profits at the time the distribution was made. The preceding sentence shall not prevent the application of subsection (d) to any such distribution.

"(2) If any portion of a distribution of property by a corporation to its shareholders, with respect to its stock, is a dividend solely by reason of the last sentence of subsection (a), then—

"(A) paragraph (1) shall not apply to such distribution, but

"(B) such distribution shall be considered to be a distribution which is not a dividend (whether or not otherwise a dividend) to the extent that the fair market value of such property exceeds the Subchapter A net income referred to in the last sentence of subsection (a), adjusted as provided in such sentence.

In applying this paragraph, distributions described in subparagraphs (A), (B), and (C) of paragraph (3) shall be taken into account before other distributions.

"(3) This subsection shall apply to any distribution of property other than—

"(A) money,

"(B) inventory assets, as defined in section 312(b)(2) of the Internal Revenue Code of 1954, or

"(C) distributions described in section 312(j) of the Internal Revenue Code of 1954."

(b) The amendment made by this section to section 115 of the Internal Revenue Code of 1939 shall be effective as if it were a part of such section on the date of enactment of the Internal Revenue Code of 1939, except that it shall not apply to any taxable year of a shareholder which was a corporation and which filed

a return for such year reporting dividends in accordance with publicly announced litigation policies of the Secretary or his delegate which had not been revoked at the time such return was filed. No interest shall be allowed or paid in respect of any overpayment of tax resulting from the amendment made by this section.

SEC. 4. TRADEMARK AND TRADE NAME EXPENDITURES.

(a) Part VI of subchapter B of chapter 1 of the Internal Revenue Code of 1954 is hereby amended by inserting after section 176 thereof the following new section:

"SEC. 177. TRADEMARK AND TRADE NAME EXPENDITURES.

"(a) ELECTION TO AMORTIZE.—Any trademark or trade name expenditure paid or incurred during a taxable year beginning after December 31, 1955, may, at the election of the taxpayer (made in accordance with regulations prescribed by the Secretary or his delegate), be treated as a deferred expense. In computing taxable income, all expenditures paid or incurred during the taxable year which are so treated shall be allowed as a deduction ratably over such period of not less than 60 months (beginning with the first month in such taxable year) as may be selected by the taxpayer in making such election. The expenditures so treated are expenditures properly chargeable to capital account for purposes of section 1016(a)(1) (relating to adjustments to basis of property).

"(b) TRADEMARK AND TRADE NAME EXPENDITURES DEFINED.—For purposes of subsection (a), the term 'trademark or trade name expenditure' means any expenditure which—

"(1) is directly connected with the acquisition, protection, expansion, registration (Federal, State, or foreign), or defense of a trademark or trade name;

"(2) is chargeable to capital account; and

"(3) is not part of the consideration paid for a trademark, trade name, or business.

"(c) TIME FOR AND SCOPE OF ELECTION.—The election provided by subsection (a) shall be made within the time prescribed by law (including extensions thereof) for filing the return for the taxable year during which the expenditure is paid or incurred. The period selected by the taxpayer under subsection (a) with respect to the expenditures paid or incurred during the taxable year which are treated as deferred expenses shall be adhered to in computing his taxable income for the taxable year for which the election is made and all subsequent years.

"(d) CROSS REFERENCE.—

"For adjustments to basis of property for amounts allowed as deductions for expenditures treated as deferred expenses under this section, see section 1016(a)(16)."

(b) The table of sections of part VI of subchapter B of chapter 1 of the Internal Revenue Code of 1954 is hereby amended by inserting at the end thereof

"Sec. 177. Trademark and trade name expenditures."

(c) Subsection (a) of section 1016 of the Internal Revenue Code of 1954 (relating to adjustments to basis) is hereby amended by striking out the period

at the end of paragraph (15) and inserting in lieu thereof a semicolon, and by adding at the end of such subsection the following new paragraph:

"(16) for amounts allowed as deductions for expenditures treated as deferred expenses under section 177 (relating to trademark and trade name expenditures) and resulting in a reduction of the taxpayer's taxes under this subtitle, but not less than the amounts allowable under such section for the taxable year and prior years."

SEC. 5. LIVESTOCK SOLD ON ACCOUNT OF DROUGHT

(a) Section 1033 of the Internal Revenue Code of 1954 (relating to involuntary conversions) is hereby amended by redesignating subsection (f) thereof as subsection (g) and by inserting after subsection (e) of such section the following new subsection:

"(f) LIVESTOCK SOLD ON ACCOUNT OF DROUGHT.—For purposes of this subtitle, the sale or exchange of livestock (other than poultry) held by a taxpayer for draft, breeding, or dairy purposes in excess of the number the taxpayer would sell if he followed his usual business practices shall be treated as an involuntary conversion to which this section applies if such livestock are sold or exchanged by the taxpayer solely on account of drought."

(b) The amendment made by this section shall apply with respect to taxable years ending after December 31, 1955, but only in the case of sales and exchanges of livestock after December 31, 1955.

Approved June 29, 1956.

Internal Revenue Code of 1939:

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) *Limitation on allowance*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(26 U.S.C. 1952 ed., Sec. 322.)

Internal Revenue Code of 1954:

SEC. 7422 CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * * *

(26 U.S.C. 1958 ed., Sec. 7422.)

APPENDIX B

I. Those Portions of the Senate and Conference Reports Dealing With Section 1235 of the Internal Revenue Code of 1954

A. S. Rep. No. 1622, 83d Cong., 2d Sess., at pp. 113–114, 438–441 (3 U.S.C. Cong. and Adm. News (1954) 4621, 4747, 5081–5084):

GENERAL STATEMENT

* * * * *

E. Sale of Patents by an Inventor (sec. 1235)

(1) House changes accepted by committee

Under present law an amateur inventor may receive capital gains treatment on the outright sale of his patent but a professional may not. However, if a sale arrangement results in royalty income, rather than installment payments, even an amateur inventor faces uncertainty as to whether he receives capital gains or ordinary income tax treatment.

The present distinction between amateur and professional inventors and between royalty income and installment payments is both arbitrary and confusing since, due to the inherent uncertainties, a royalty type of arrangement is the reasonable way for an inventor to sell a patent. Moreover, the present treatment tends to discourage scientific work.

The House bill made no distinction between amateur and professional inventors or between royalty income and installment sales. Capital gains treatment was to be available in all such cases if the contract does not make the sales

price dependent, for a period of more than 5 years, upon the productivity, use, or disposition of the patent in the hands of the buyer, and if the payments are completed in 5 years (except for late payments resulting from the failure of the buyer to meet the contract terms). The statute of limitations was extended for this purpose. These restrictions were drastically revised by your committee.

(2) *Changes made by committee*

Your committee did not feel that the House bill accomplished its objective of stimulating inventions because section 1235 was restricted to the inventor and because of the 5-year rule. The section has been amended so as to apply also to an individual who purchased his interest in the invention prior to the point in time when the invention is reduced to actual practice, but this individual may not be a close relative nor an employer of the inventor. The provisions of the House bill were amended further to remove the 5-year rule. This means that any income from an assignment or an exclusive license agreement which qualifies as a sale or exchange, in the hands of a qualified assignor or licensor, will be capital gains, whether or not it depends on the profitable use of the patent by the assignee or licensee.

* * * * *

DETAILED DISCUSSION OF THE TECHNICAL PROVISIONS OF THE BILL

* * * * *

Section 1235. Sale or exchange of patents

This section is an extensive revision of section 1235 of the House bill. It has no counterpart under existing law.

Subsection (a) provides that a transfer (other than by gift, inheritance or devise) of property consisting of all substantial rights evidenced by a patent, or consisting of an undivided interest therein, by certain holders shall be deemed the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are payable periodically over a period generally coterminous with the transferee's use of the patent or are contingent on the productivity, use, or disposition of the property transferred. The section does not apply to a property right in an invention differing from the monopoly rights evidenced by a patent. However, since the inventor possesses an exclusive inchoate right to obtain a patent, he may transfer his interest, what ever it may be, in any subsequently issued patent before its issuance and before as well as after he has made application for such patent. By "undivided interest" a part of each property right represented by the patent (constituting a fractional share of the whole patent) is meant (and not, for example, a lesser interest such as a right to income, or a license limited geographically, or a license which conveys some, but not all, of the claims or uses covered by the patent). Payments which come within the scope of the section include, but are not limited to, amounts which are payable over a period generally coterminous with the transferee's use of the patent, or amounts which are measured by a fixed percentage of the selling price of the patent article, or are based on units manufactured or sold, or any other method measured by profits, production, sale, or use.

Under present law, an express assignment of patent rights by the owner, or an exclusive license of the right to manufacture, use, and sell, the invention thereunder for the life of the patent, can qualify as a "sale or exchange" for

tax purposes; thus, the holder can obtain capital-gains treatment on such a transfer if he falls within the "amateur" category. Many court decisions have arrived at this result, not only where the manner of payment has been a lump sum, but also where the purchase price has been conditioned on the use or profitability of the invention, i.e., where it takes the form of "royalty" payments. (See, e.g., *Kronner* v. *United States*, 110 F. Supp. 730 (Ct. Cls. 1953); *Commissioner* v. *Celanese Corp.*, 140 F. (2d) 339 (C.A. of D.C. 1944); *Commissioner* v. *Hopkinson*, 126 F. (2d) 406 (C.C.A. 2d 1942); *Edward C. Myers*, 6 T.C. 258 (1946), Non. Acq. 1950-1 CB 7.) However, in 1950 the prospect of continued litigation was engenderd in this area by the issuance of Mimeograph 6490 (1950-1 CB 9), in which the Commissioner of Internal Revenue announced that he would thereafter regard such assignments or licenses as "providing for the payment of royalties taxable as ordinary income" if payment is measured by the production, sale, or use of the property transferred or if it is payable periodically over a period generally coterminous with the transferee's use of the patent. To obviate the uncertainty caused by this mimeograph and to provide an incentive to inventors to contribute to the welfare of the Nation, your committee intends, in subsection (a), to give statutory assurance to certain patent holders that the sale of a patent (whether as an "assignment" or "exclusive license") shall not be deemed not to constitute a "sale or exchange" for tax purposes solely on account of the mode of payment.

The section does not detail precisely what constitutes the formal components of a sale or exchange of patent rights beyond requiring that all substantial rights evidenced by the patent (other than the right to such periodic or contingent payments) should be transferred to the transferee for consideration. This re-

quirement recognizes the basic criteria of a "sale or exchange" under existing law, with the exception noted relating to contingent payments, which exception is justified in the patent area for "holders" as herein defined. To illustrate, exclusive licenses to manufacture, use, and sell for the life of the patent, are considered to be "sales or exchanges" because, in substantive effect, all "right, title, and interest" in the patent property is transferred (irrespective of the location of legal title or other formalities of language contained in the license agreement). Moreover, the courts have recognized that an exclusive license agreement in some instances may constitute a sale for tax purposes even where the right to "use" the invention has not been conveyed to the licensee, if it is shown that such failure did not represent the retention of a substantial right under the patent by the licensor. It is the intention of your committee to continue this realistic test, whereby the entire transaction, regardless of formalities, should be examined in its factual context to determine whether or not substantially all rights of the owner in the patent property have been released to the transferee, rather than recognizing less relevant verbal touchstones. The word "title" is not employed because the retention of bare legal title in a transaction involving an exclusive license may not represent the retention of a substantial right in the patent property by the transferor. Furthermore, retention by the transferor of rights in the property which are not of the nature of rights evidenced by the patent and which are not inconsistent with the passage of ownership, such as a security interest (e.g., a vendor's lien) or a reservation in the nature of a condition subsequent (e.g., a forfeiture on account of nonperformance) are not to be considered as such a retention as will defeat the applicability of this section. On the other hand, a trans-

fer terminable at will by the transferor would not qualify.

Subsection (b) specifies the categories of taxpayers who are entitled to the benefits of this section. It is limited to individuals. A "holder" is defined as any individual whose efforts created the patent property transferred, by which is meant the "first and original" inventor (or joint inventor) within the meaning of section 31 of title 35 of the United States Code. Individuals not eligible to qualify as such "first and original" inventor will not qualify under this definition: for example, the inventor's employer may not here qualify, even though he may be the equitable owner of the patent by virtue of an employment relationship with the inventor. However, your committee is desirous of extending the scope of this section to cover (in addition to inventors) those individuals who contribute financially toward the development of the invention. Accordingly, paragraph (2) of subsection (b) also includes within the definition of "holder" any other individual who acquired his interest in such property in exchange for consideration in money or money's worth (i.e., consideration capable of present valuation in monetary terms) actually paid to the creator prior to the time when the invention (to which the patent rights relate) is actually reduced to practice (as compared to "constructive" reduction to practice). This paragraph does not include any individual who is either an employer of any creator or related to any such creator within the meaning of subsection (d); however, the section does apply to all qualifying individuals, whether amateur or professional, regardless of how often they may have sold their patents. The section is not applicable to any other purchasers or assignees.

Subsection (c) provides an effective date for operation of the section: the section is to be applicable with respect to amounts received in

any taxable year to which the subtitle applies, if the assignment or license agreement by virtue of which such payments arise would have qualified under this section, regardless of the taxable year in which such assignment or license took place. Such amounts will also be given consistent treatment in the hands of the payor, in that, if the transfer is considered a sale or exchange under the section, they will be regarded as part payments of a purchase price rather than royalties.

The section does not apply to sales between related taxpayers as defined in section 267 (b), with the exception of brothers and sisters. The sale of a patent between an individual and a corporation more than 50 percent in value of the outstanding stock of which is owned, directly or indirectly, by or for such individual would not, for example, be entitled to capital gain treatment under this section. It is not considered that this limitation will in any way narrow the opportunity of inventors to dispose of their patents through normal business channels; on the other hand, this limitation should prevent possible abuses arising from the sale of patents within essentially the same economic group.

It is the intention of your committee that, if the mode of payment is as described in subsection (a), the sale of a patent by any "holder" must qualify under the section in order for such "holder" to obtain capital gain treatment. However, the benefits of this section are to be limited to those individuals and transfers qualifying under its terms. In enacting this section, for the specific purposes set forth in this report, your committee has no intention of affecting the operation of existing law in those areas without its scope. For example, the tax consequences of the sale of patents in years to which this section is inapplicable, or by individuals who fail to qualify as "holders," or by corporations, is to

be governed by the provisions of existing law as if this section had not been enacted. Similarly, no inference is to be drawn from this section as to what constitutes a "sale or exchange" in other than the patent field. Benefits under the section are not available to nonresident aliens.

* * * * *

B. H. Conference Rep. No. 2543, 83d Cong., 2d Sess., p. 70 (3 U.S.C. Cong. and Adm. News (1954) 5280, 5331):

* * * * *

Amendment No. 246: This amendment completely rewrites the provision in the House bill dealing with patents. Under the House bill an inventor could sell his interest in a patent under an arrangement whereby his price would be contingent on the profitability or productivity of the patent in the hands of the buyer provided that he received his full payment within 5 years of the date of sale.

This amendment makes three substantive changes. First, the 5-year limitation is eliminated with the effect that all income from an exclusive license of all the substantial rights under a patent will be a capital gain. Second, the requirement of a 6-month holding period is dropped. Third, as under the House bill, the professional inventor is accorded the same treatment as the amateur inventor but the amendment extends this favorable treatment to any individual who purchases an interest in the invention before the time it is actually "reduced to practice." The employer of the inventor and an individual closely related to the inventor, however, are made ineligible for this treatment.

The House recedes with an amendment to make it clear that the section applies to transfers prior to the issuance of the patent.

* * * * *

II. Those Portions of the Committee Reports Dealing With Section 117(q) of the Internal Revenue Code of 1939

A. H. Rep. No. 1607, 84th Cong., 1st Sess., at pp. 1–2 (1956–2 Cum. Bull. 1226–1227) [only that portion of the Committee Report setting forth the statutory language is omitted]:

> The Committee on Ways and Means, to whom was referred the bill (H.R. 6143) to amend the Internal Revenue Code of 1939 to provide that for taxable years beginning after May 31, 1950, certain amounts received in consideration of the transfer of patent rights shall be considered capital gain regardless of the basis upon which such amounts are paid, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.
>
> PURPOSE OF THE BILL
>
> This bill amends the Internal Revenue Code of 1939 to apply the special rules providing capital gains treatment for sales or exchanges of patents in section 1235 of the Internal Revenue Code of 1954 to taxable years beginning after May 31, 1950.
>
> GENERAL STATEMENT
>
> Prior to the enactment of the 1954 Code, there was no special provision relating to the sale or exchange of rights to a patent. The determination of what constituted a "sale" and what constituted a mere "license" was determined under general principles of law. The Tax Court held that certain agreements where the purchase price is conditional on the use or profitability of the invention constituted a sale in *Edward C. Myers* (6 T.C. 258 (1946), Acq. 1946–1 C.B. 3, Non. Acq. 1950–1 C.B. 7). The general principle established by this decision

was recently accepted (and the Internal Revenue Service's position rejected) in *United States* v. *Carruthers* (219 F. 2d 21 (9th Cir. 1955)). The Government's nonacquiescence in Myers raised a doubt concerning numerous existing and future contracts and was one of the reasons for the enactment of section 1235. This section provides that a transfer of all substantial rights to a patent (or an undivided interest therein) is to be considered as the sale or exchange of a capital asset held for more than 6 months whether or not payments are to be made periodically during the period of the transferee's use of the patent and whether or not the payments are contingent on the productivity, use, or disposition of the property transferred. The relief provided was limited to holders of the patent, defined as the individual whose efforts created the property transferred, i. e., the inventor, or an individual (other than an employer or a relative) who acquired his interest in the property in exchange for money paid to the creator prior to the actual reduction to practice of the invention.

The rule enacted in section 1235 was applicable with respect to amounts received in any taxable year to which the 1954 Code applied, regardless of the year in which the transfer occurred. While this provision removed the previous uncertainty in the law for the inventors and other persons covered by the section, the Internal Revenue Service has announced (Revenue Ruling 1955-58) that it will adhere to its position for years beginning after May 31, 1950, and prior to the effective date of the 1954 Code. Thus, payments received from such transactions in these years would continue to be treated as ordinary income by the Internal Revenue Service rather than as capital gain to the transferor.

This bill adds a new subsection to section 117 of the 1939 Code which is substantially the

same as section 1235 of the 1954 Code. This subsection is to apply to payments made, and amounts received, in years to which the 1939 Code applies, beginning after May 31, 1950.

When section 1235 was originally enacted, it was stated in the committee report that there was no intention of affecting the operation of existing law in those areas outside the scope of the section, and no inference was to be drawn from section 1235 as to what constituted a "sale or exchange" in the case of transfers not within the scope of the section. Similarly, no inference is to be drawn from the enactment of this bill.

Your committee has reported this bill unanimously.

* * * * *

B. S. Rep. No. 1941, 84th Cong., 2d Sess., at pp. 1, 4-5 (1956-2 Cum. Bull. 1227, 1229-1230) [the omitted portions of the Committee Report relate to the other proposed amendments of the 1939 and 1954 Codes]:

The Committee on Finance, to whom was referred the bill (H.R. 6143) to amend the Internal Revenue Code of 1939 to provide that for taxable years beginning after May 31, 1950, certain amounts received in consideration of the transfer of patent rights shall be considered capital gain regardless of the basis upon which such amounts are paid, having considered the same, report favorably thereon with amendment and recommend that the bill, as amended, do pass.

* * * * *

SECTION 1. INCOME-TAX TREATMENT OF CERTAIN TRANSFERS OF PATENT RIGHTS

Section 1 of this bill, which was adopted by your committee without amendment, makes applicable the special rules providing capital-gains treatment for sales or exchanges of patents in section 1235 of the Internal Revenue

Code of 1954 to taxable years beginning after May 31, 1950, by amending the Internal Revenue Code of 1939.

Prior to the enactment of the 1954 Code, there was no special provision relating to the sale or exchange of rights to a patent. The determination of what constituted a "sale" and what constituted a mere "license" was determined under general principles of law. The Tax Court held that certain agreements where the purchase price is conditioned on the use or profitability of the invention constituted a sale in *Edward C. Myers* (6 T.C. 258 (1946), Acq. 1946–1 C.B. 3; Non. Acq. 1950–1 C.B. 7). The general principle established by this decision was recently accepted (and the Internal Revenue Service's position rejected) in *United States* v. *Carruthers* (219 F. 2d 21 (9th Cir. 1955)). The Government's nonacquiescence in Myers raised a doubt concerning numerous existing and future contracts and was one of the reasons for the enactment of section 1235. This section provides that a transfer of all substantial rights to a patent (or an undivided interest therein) is to be considered as the sale or exchange of a capital asset held for more than 6 months whether or not payments are to be made periodically during the period of the transferee's use of the patent and whether or not the payments are contingent on the productivity, use, or disposition of the property transferred. The relief provided was limited to holders of the patent, defined as the individual whose efforts created the property transferred, i.e., the inventor, or an individual (other than an employer or a relative) who acquired his interest in the property in exchange for money paid to the creator prior to the actual reduction to practice of the invention.

The rule enacted in section 1235 was applicable with respect to amounts received in any taxable year to which the 1954 Code applied.

regardless of the year in which the transfer occurred. While this provision removed the previous uncertainty in the law for the inventors and other persons covered by the section, the Internal Revenue Service has announced (Revenue Ruling 1955–58) that it will adhere to its position for years beginning after May 31, 1950, and prior to the effective date of the 1954 Code. Thus, payments received from such transactions in these years would continue to be treated as ordinary income by the Internal Revenue Service rather than as capital gain to the transferor.

This bill adds a new subsection to section 117 of the 1939 Code which is substantially the same as section 1235 of the 1954 Code. This subsection is to apply to payments made, and amounts received, in years to which the 1939 Code applies, beginning after May 3, 1950.

When section 1235 was originally enacted, it was stated in the committee report that there was no intention of affecting the operation of existing law in those areas outside the scope of the section, and no inference was to be drawn from section 1235 as to what constituted a "sale or exchange" in the case of transfers not within the scope of the section. Similarly, no inference is to be drawn from the enactment of this bill.

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APPENDIX C

Retroactive Tax Measures 1953–1962 [1]

CATEGORY I

Measures Extending the Period for Filing Refund Claims for Six Months or a Year After the Date of Enactment

Nine measures fall within this category. Nos. 1–3 provided for an additional period of six months from the date of enactment for filing refund claims, and prohibited payment of interest on refunds. Nos. 4–7 resembled Nos. 1–3, except that the grace period was one year. Nos. 8 and 9 provided a one-year grace period, but were silent as to interest.

1. Section 14 of the Technical Amendments Act of 1958, 72 Stat. 1606, 1611, provided certain transitional rules in computing net operating loss deductions for years beginning in 1953 and ending in 1954, or short taxable years beginning in 1954 and ending before August 17, 1954. As the Senate Report explained (S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 23–24 (1958-3 Cum. Bull. 922, 944–945)), Section 172(f)

[1] This survey covers a ten year period beginning approximately three and a half years before enactment of the Act of June 29, 1956, and ending with the most recent retroactive amendment as of the date the petition for certiorari in this case was filed. The five categories into which these statutes are divided are essentially artificial. They were adopted primarily to reduce a mass of disparate statutory provisions into manageable form when the petition for certiorari was filed, and for ready reference the same categories are used in this Appendix. Some of the statutes would fit just as readily into a category other than the one in which they were placed.

of the 1954 Code provided, in substance, that a net operating loss for years beginning in 1953 and ending in 1954 was to be determined by applying the 1939 Code rules to the portion of the taxable year falling in 1953 and the 1954 Code rules to the portion of the year falling in 1954. Section 14 of the Technical Amendments Act of 1958, the Senate Report said (p. 24):

> * * * equates the method of computing net operating losses in these cases by providing that where a loss is carried to, or through, one of these years, the 1954 code concepts are to apply on a pro rata basis with respect to the portion of such year which falls in the calendar year 1954.

Subsection (c) of this amendment provided as follows:

> (c) *Statute of Limitations, etc; Interest.*—If refund or credit of any overpayment resulting from the application of the amendment made by subsection (a) or (b) is prevented on the date of the enactment of this Act, or within 6 months after such date, by the operation of any law or rule of law (other than section 3760 of the Internal Revenue Code of 1939 or section 7121 of the Internal Revenue Code of 1954, relating to closing agreements, and other than section 3761 of the Internal Revenue Code of 1939 or section 7122 of the Internal Revenue Code of 1954, relating to compromises), refund or credit of such overpayment may, nevertheless, be made or allowed if claim therefor is filed within 6 months after such date. No interest shall be paid or allowed on any overpayment resulting from the application of the amendment made by subsection (a) or (b).

The Senate Report, *supra*, p. 24, explained in the following terms why the Senate felt it was necessary to add subsection (c):

> Your committee did amend the House provision, however, in one respect because 3 years have now elapsed since 1954 and many of the transitional years with which this provision is concerned are now closed years. To prevent relief from being denied in such cases, your committee amends this provision to provide that if a refund or credit with respect to this provision is prevented on the date of enactment of this bill or within 6 months after that time by the operation of any law or rule of law (except closing agreements or compromises) refund or credit, nevertheless, is to be allowed if the claim is filed within 6 months of the date of enactment of this bill. No interest is to be paid or allowed on any refunds or credits arising from this provision.
>
> This provision is expected to result in a one-time revenue loss of approximately $1 million.

This amendment is discussed in the Argument, *supra*, pp. 28–29.

2. Section 22 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1667 added Section 22(p) of the Internal Revenue Code of 1939, providing that in the case of contracts entered into before January 1, 1952, in which one party agreed to reimburse the other party for taxes imposed on income derived under the contract, gross income of the payee would include only the first reimbursement of tax, determined without inclusion of the reimbursement in the payee's gross income. Subsection (b) of the amendment provided as follows:

> (b) *Effective Date, etc.*—The amendment made by subsection (a) shall apply with respect to taxable years beginning after December 31, 1951, to which the Internal Revenue

Code of 1939 applies. If refund or credit of any overpayment resulting from the application of the amendment made by subsection (a) of this section is prevented on the date of the enactment of this Act, or within 6 months from such date, by the operation of any law or rule of law (other than section 3760 of the Internal Revenue Code of 1939 or section 7121 of the Internal Revenue Code of 1954, relating to closing agreements, and other than section 3761 of the Internal Revenue Code of 1939 or section 7122 of the Internal Revenue Code of 1954, relating to compromises), refund or credit of such overpayment, may, nevertheless, be made or allowed if claim therefor is filed within 6 months from such date. No interest shall be paid on any overpayment resulting from the application of the amendment made by subsection (a) of this section.

The purpose of the amendment is explained by the following excerpt from the Report of the Ways and Means Committee (H. Rep. No. 775, 85th Cong., 1st Sess., pp. 48–49 (1958–3 Cum. Bull. 811, 858–859)):

> In some cases lessees contract to pay a fixed rental to a lessor without reduction for Federal income taxes, or agree to pay an annual rental plus any Federal income taxes of the lessor attributable to this rental income. For taxable years prior to 1952, it was the consistent practice of the Internal Revenue Service, for more than 30 years, to include in the lessor's income only the amount of the fixed annual rental plus the initial or original tax on the rental paid to the lessee. Any additional tax of the lessor paid by the lessee under the lease agreement was not included in the lessor's income.
>
> However, this rule was changed in 1952 by Mimeograph 6779 (C.B. 1952–1, p. 8), as modified by Internal Revenue Service Mimeograph 51 (C.B. 1952–2, p. 65), with the result that for

taxable years beginning after December 31, 1951, the Internal Revenue Service held that the lessor is deemed not only to have received as income the stipulated rental payment, but also all Federal income taxes paid by the lessee on behalf of the lessor. Since the lessee is obligated to pay all Federal income taxes, this additional tax, in turn, gives rise to additional income to the lessor which, in turn, gives rise to additional tax and additional income, etc. In this manner the tax on a tax is pyramided to a point where the income tax liability paid by the lessee may be greatly in excess of the initial tax on the rental income, except in those cases where the lease agreement contains a ceiling on the liability of the lessee to pay the lessor's taxes.

Section 110 of the 1954 Code changed this rule, however, for 1954 and subsequent taxable years where both the lessee and lessor are corporations. Under this section the lessor is required to include in income only the amount of the rental payment, and only this amount is allowed as a deduction to the lessee. The lessee is not allowed to deduct any income taxes paid on behalf of the lessor. As a result, hardship in this area exists only with respect to the taxable years 1952 and 1953.

In view of the consistent practice for more than 30 years of the Internal Revenue Service for taxable years before 1952, your committee believes that it is appropriate to make this pre-1952 rule applicable to all taxable years coming under the 1939 Code. This section of your committee's bill amends section 22 of the 1939 Code to accomplish this result. This amendment provides that if a lease was entered into before January 1, 1952, both the lessee and lessor are corporations, and under the terms of the lease the lessee is obligated to pay or reimburse the lessor for any part of his income taxes with re-

spect to the rentals he derives from the lease, then the new provision is to be applicable.

This provision applies to taxable years beginning after December 31, 1951, to which the 1939 Code applies. If any of these years are closed years, the statute of limitations is opened for a period of 6 months after the date of enactment of this bill for the claiming of credit or refunds. No interest is to be paid on any overpayment resulting from this provision.

This provision is expected to result in a negligible revenue loss.

The House bill was expanded in the Senate to apply to contracts other than leases. See S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 103–105 (1958–3 Cum. Bull. 922, 1024–1026).

3. Section 5 of the Act of September 14, 1960, 74 Stat. 1010, 1013, provided as follows:

SEC. 5. Any amount received after December 31, 1949, and before October 1, 1955, from a corporation which—

(1) was formed exclusively for the purpose of, and was engaged exclusively in, operating without profit a scientific laboratory for the Atomic Energy Commission, and

(2) operated solely on funds appropriated to the Atomic Energy Commission,

by an individual as reimbursement for moving himself and his immediate family, household goods, and personal effects to a new place of residence in order to accept employment with such corporation shall, for Federal income tax purposes, be treated as an amount which was not includible in the gross income of the individual, to the extent that such amount did not exceed the actual expenses paid or incurred by the individual for such purposes, if the individual was advised, at the time of his employment, by an authorized officer, employee, or agent of such corporation that the amount of

such reimbursement would not be includible in gross income. If refund or credit of any overpayment resulting from the application of this section is prevented on the date of enactment of this Act, or within six months after such date, by the operation of any law or rule of law (other than chapter 74 of the Internal Revenue Code of 1954, relating to closing agreements and compromises, and the corresponding provisions of prior law), refund or credit of such overpayment may, nevertheless, be made or allowed if claim therefor is filed within six months after such date. No interest shall be paid or allowed on any overpayment resulting from the application of the preceding sentence.

This amendment was apparently designed to provide for a situation involving one specific corporation performing research and development work for the Atomic Energy Commission, which paid traveling and moving expenses of certain employees and informed them these expense reimbursements were not taxable income. See S. Rep. No. 1393, 86th Cong., 2d Sess., pp. 10–11 (1960–2 Cum. Bull. 874, 881), which stated, in part, as follows:

> A situation has been called to the attention of your committee involving moving expenses received by employees of a corporation formed to perform research, development and production tasks for the Atomic Energy Commission on the ordnance aspect of atomic weapons. The corporation concerned engages only in activities assigned to it by the Atomic Energy Commission, and it operates under a contract which specifically provides that all costs and expenses of operation will be reimbursed by the Atomic Energy Commission from appropriations by Congress. Also, under the contract the services of the corporation involved are to be rendered without profit of any kind.

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> In hiring the professional and skilled employees required for the type of work in which the corporation is involved, the corporation paid the traveling and moving expenses incurred by the new employees in moving to accept employment. Until Revenue Ruling 55-140 (C.B. 1955-1, 317) was issued in March of 1955, the officials of the corporation had assumed that such expense reimbursement was not taxable income. * * *
>
> In view of all of the circumstances involved in this case, your committee believes that it would be unfortunate to impose income tax with respect to the reimbursement of moving expenses for the employees of this corporation.

4. Section 207 of the Technical Changes Act of 1953, 67 Stat. 615, 623, amended Section 811(c) of the 1939 Code to exempt from estate tax in certain cases property transferred prior to March 4, 1931, and in certain other cases property transferred between March 3, 1931, and June 7, 1932, where the transferor retained a life estate. The measure provided as follows:

> SEC. 207. EXCLUSION OF CERTAIN TRANSFERS TAKING EFFECT AT DEATH.
>
> (a) *Decedents Dying After February 10, 1939.*—Paragraph (1) of section 811(c) (relating to the inclusion of certain interests in the decedent's gross estate) is hereby amended by inserting after subparagraph (C) the following:
>
> "Subparagraph (B) shall not apply to a transfer made before March 4, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by

reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516)."

(b) *Decedents Dying Before February 11, 1939.*—For the purposes of section 302(c) of the Revenue Act of 1926, as amended, an interest of a decedent shall not be included in his gross estate as intended to take effect in possession or enjoyment at or after his death unless it would have been includible as such a transfer under section 811(c)(2) of the Internal Revenue Code, as amended by section 7 of Public Law 378, Eighty-first Congress, approved October 25, 1949 (63 Stat. 891), had such section 811(c)(2), as so amended applied to the estate of such decedent. No refund or credit of any overpayment resulting from the application of this subsection shall be allowed or made if prevented by the operation of the statute of limitations or by any other law or rule of law; except that if the determination of the Federal estate tax liability in respect of the estate of any decedent dying before February 11, 1939, was pending on January 17, 1949, in the Tax Court of the United States or in any other court of competent jurisdiction, or if a decision of the Tax Court of the United States or such other court determining such estate tax liability did not become final until on or after January 17, 1949, then refund or credit of any overpayment resulting from the application of this subsection may, nevertheless, be made or allowed if claim therefor is filed within one year from the date of the enactment of this Act, notwithstanding section 319(a) of the Revenue Act of 1926 or any other law or rule of law which would otherwise prevent the allowance of such refund or credit.

(c) *Interest.*—No interest shall be allowed or paid on any overpayment resulting from the application of this section with respect to any payment made before the date of the enactment of this Act.

(d) *Effective date.*—The amendment made by subsection (a) shall apply only with respect to estates of decedents dying after February 10, 1939. Subsection (b) shall apply only with respect to estates of decedents dying before February 11, 1939.

Section 7 of the Technical Changes Act of 1949, 63 Stat. 891, 894, provided that property transferred prior to March 4, 1931, and certain property transferred prior to June 7, 1932, was not to be included in a decedent's gross estate merely because of his retention of a life estate. That amendment, a response to the decision of this Court in *Commissioner* v. *Church,* 335 U.S. 632 (1949), was made applicable to estates of decedents dying after February 10, 1939, the effective date of the 1939 Code, and before January 1, 1951. The purpose of Section 207 of the Technical Changes Act of 1953 was to extend the rules embodied in Section 7 of the Technical Changes Act of 1949 to cover estates of decedents dying before February 11, 1939, and after December 31, 1950. See H. Rep. No. 894, 83d Cong., 1st Sess., pp. 7–8 (1953-2 Cum. Bull. 508, 513); S. Rep. No. 685, 83d Cong., 1st Sess., pp. 7–8 (1953-2 Cum. Bull. 526, 530, 531). With respect to estates of decedents who died prior to February 11, 1939, the statute of limitations was opened to a limited extent, to permit refunds in cases pending in the courts on the date of the decision in the *Church* case. The House Report (p. 8), contained the following statement relating to the statute of limitations:

> However, your committee has not felt it necessary to open the statute of limitations to any great extent in cases of decedents dying prior to February 11, 1939. It is only in cases in litigation at the time of the Church decision

> where there would appear to be any undue hardship. In these cases a refund or credit resulting from this provision will be allowed if claim is filed within 1 year from the date of enactment of this act.

The Senate Report, *supra*, p. 8, contained substantially the same statement.

5. Section 93 of the Technical Amendments Act of 1958, 72 Stat. 1606, 1668, amended Section 812(e)(1)(F) of the 1939 Code to qualify for the marital deduction certain interests in property as to which the surviving spouse was given the income for life and a general power of appointment over the remainder. Subsection (b) of this amendment provided as follows:

> (b) *Effective Date.*—The amendment made by subsection (a) shall apply with respect to estates of decedents dying after April 1, 1948, and before August 17, 1954. If refund or credit of any overpayment resulting from the application of such amendment is prevented on the date of the enactment of this Act, or at any time within one year from such date, by the operation of any law or rule of law (other than section 3760 of the Internal Revenue Code of 1939 or section 7121 of the Internal Revenue Code of 1954, relating to closing agreements, and other than section 3761 of the Internal Revenue Code of 1939 or section 7122 of the Internal Revenue Code of 1954, relating to compromises), refund or credit of such overpayment may, nevertheless, be made or allowed if claim therefor is filed within one year after the date of the enactment of this Act. No interest shall be allowed or paid on any overpayment resulting from the enactment of this section.

The purpose of the amendment, as stated by the Senate Report (S. Rep. No. 1983, 85th Cong., 2d

Sess., p. 107 (1958-3 Cum. Bull. 922, 1028)), was "to conform the marital deduction provisions of the 1939 Code with the more realistic rules of the 1954 Code." This Report gave the following reason for adding the provisions of subsection (b) quoted above relating to the limitations period for filing claims for refund:

> The provision also opens the statute of limitations for purposes of refund or credit of overpayments (where the statute was not closed by a closing agreement or compromise). For this purpose the statute is open for 1 year after the date of enactment of the bill. No interest is to be paid with respect to any refunds under this provision.

6. Section 26 of the Revenue Act of 1962, P.L. 87-834, 76 Stat. 960, 1067, provided as follows:

> SEC. 26. CONTINUATION OF A PARTNERSHIP YEAR FOR SURVIVING PARTNER IN A TWO-MAN PARTNERSHIP WHERE ONE DIES.
>
> (a) *Close of Taxable Year of Two-Man Partnership When One Partner Dies.*—Section 188 of the Internal Revenue Code of 1939 (relating to different taxable years of partner and partnership) is amended—
>
> (1) by striking out "If" and inserting in lieu thereof "(a) *General Rule.*—If"; and
>
> (2) by adding at the end of such section 188 the following new subsection:
>
> "(b) *Two-man Partnership.*—For the purpose of this chapter, the death of one of the partners of a partnership consisting of two members shall not, if the surviving partner so elects within one year after the date of enactment of this subsection, result in the termination of the partnership or in the closing of the taxable year of the partnership with respect to the surviving partner prior to the time the

partnership year would have closed if neither partner had died or disposed of his interest."

(b) *Effective Date, etc.*—The amendments made by subsection (a) shall apply with respect to taxable years of a partnership beginning after December 31, 1946, to which the Internal Revenue Code of 1939 applies. If refund or credit of any overpayment resulting from the application of the amendments made by subsection (a) of this section (including interest, additions to the tax, and additional amounts) is prevented on the date of enactment of this Act, or within one year from such date, by the operation of any law or rule of law (other than section 3760 of the Internal Revenue Code of 1939 or section 7121 of the Internal Revenue Code of 1954, relating to closing agreements, and other than section 3761 of the Internal Revenue Code of 1939 or section 7122 of the Internal Revenue Code of 1954, relating to compromises), such refund or credit of such overpayment, may, nevertheless, be made or allowed if claim therefor is filed within one year after the date of the enactment of this Act. No interest shall be allowed or paid on any overpayment resulting from the enactment of this section.

The Senate Report explains the amendment as follows (S. Rep. No. 1881, 87th Cong., 2d Sess., p. 133 (1962-3 Cum. Bull. 707, 839)):

C. *General explanation of provision*

The bill adds a provision to the 1939 Internal Revenue Code to provide that the death of a partner in a two-man partnership is not to result in the termination of the partnership, or the closing of the taxable year of the partnership with respect to the surviving partner, prior to the time the partnership year would have closed if neither partner had died nor disposed of his interest. Thus, in the case of

> a partner dying in 1946 where the partnership year does not end until January 31, 1947, the partnership year would continue to that date and the income for such year would be reported by the surviving partner on his tax return for 1947. This provision is to apply only if the surviving partner so elects within 1 year after the date of enactment of this provision.
>
> This amendment applies to taxable years of a partnership beginning after December 31, 1946, to which the Internal Revenue Code of 1939 applies. Generally the 1939 Code applied to partnership taxable year beginning before January 1, 1955. The bill also provides that if refund or credit for an overpayment resulting from the application of this provision is prevented by the operation of any law or rule of law (other than those relating to closing agreements or compromises) the refund or credit of the overpayment may nevertheless be made if the claim is filed within 1 year after the date of enactment of this bill.

This provision appears to have been enacted primarily to relieve one hardship case called to the attention of the Senate Finance Committee. See S. Rep. No. 1881, *supra*, pp. 132–133 (1962–3 Cum. Bull. 838–839), which notes that the attention of the Committee has been called to "a case where partnership provisions of the 1939 Code worked a substantial hardship," and also refers to "the case brought to your committee's attention."

7. Section 27 of the Revenue Act of 1962, *supra*, 76 Stat. 960, 1067, provided as follows:

> SEC. 27. EXCLUSION FROM GROSS INCOME OF CERTAIN AWARDS MADE PURSUANT TO EVACUATION CLAIMS OF JAPANESE-AMERICAN PERSONS
>
> (a) *In General.*—No amount received as an award under the Act entitled "An Act to au-

thorize the Attorney General to adjudicate certain claims resulting from evacuation of certain persons of Japanese ancestry under military orders", approved July 2, 1948, as amended by Public Law 116, Eighty-second Congress, and Public Law 673, Eighty-fourth Congress (50 U.S.C. App., secs. 1981–1987), shall be included in gross income for purposes of chapter 1 of the Internal Revenue Code of 1939 or chapter 1 of the Internal Revenue Code of 1954.

(b) *Effective Date, etc.*—Subsection (a) shall apply with respect to taxable years ending after July 2, 1948. If refund or credit of any overpayment of Federal income tax resulting from the application of subsection (a) (including interest, additions to the tax, additional amounts, and penalties) is prevented on the date of the enactment of this Act, or within one year from such date, by the operation of any law or rule of law, the refund or credit of such overpayment may nevertheless be made or allowed if claim therefor is filed within one year after the date of enactment of this Act. In the case of a claim to which the preceding sentence applies, the amount to be refunded or credited as an overpayment shall not be diminished by any credit or setoff based upon any item other than the amount of the award referred to in subsection (a). No interest shall be allowed or paid on any overpayment resulting from the application of this section.

The Conference Report (H. Conference Rep. No. 2508, 87th Cong., 2d Sess., p. 46 (1962–3 Cum. Bull. 1129, 1174)) explains the amendment as follows:

EXCLUSION FROM GROSS INCOME OF CERTAIN AWARDS MADE PURSUANT TO EVACUATION CLAIMS OF JAPANESE-AMERICANS

Amendment No. 195: This amendment, which adds a new section to the bill, provides that

awards received under the Japanese-American Evacuation Claims Act, as amended in 1951 and 1956 (50 U.S.C. App., secs. 1981–1987), are not to be included in gross income for purposes of chapter 1 of the Internal Revenue Code of 1939 or 1954. This treatment is to apply with respect to taxable years ending after July 2, 1948.

Any refund or credit of an overpayment of Federal income tax (including interest, additions to the tax, additional amounts, and penalties) resulting from this provision which is barred on the date of the enactment of this bill, or within 1 year from such date, by any law or rule of law may, nevertheless, be made, without interest, if a claim for such refund or credit is filed within 1 year after the date of enactment of the bill. In the case of any claim described in the preceding sentence, the amount to be refunded or credited as an overpayment is not to be diminished by any credit or setoff based on any item other than the amount of the award.

The House recedes with technical amendments.

8. Section 2 of the Act of June 29, 1956, 70 Stat. 404, the same Act which (in Section 1) added Section 117(q) to the 1939 Code, provided in part as follows:

> (b) The amendment made by this section shall apply with respect to taxable years ending after December 31, 1948, notwithstanding the operation of any law or rule of law (other than section 3760 of the Internal Revenue Code of 1939 or section 7121 of the Internal Revenue Code of 1954, relating to closing agreements, and other than section 3761 of the Internal Revenue Code of 1939 or section 7122 of the Internal Revenue Code of 1954, relating to compromises). Notwithstanding the preceding sentence, no claim for credit or refund of any overpayment resulting from the amendment

> made by this section shall be allowed or made after the period of limitation applicable to such overpayment, except that such period shall not expire before the expiration of one year after the date of the enactment of this Act.

This amendment is discussed in detail in the Argument, *supra*, pp. 30–32.

9. Section 100 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1673, provided as follows:

> SEC. 100. REASONABLE CAUSE FOR FAILURE TO FILE RETURN.
>
> The second sentence of section 106 of the Internal Revenue Code of 1939 (relating to reasonable cause for failure to file a return in cases involving certain claims against the United States) shall apply with respect to taxable years ending after December 31, 1942, in any case in which an amount is received in any taxable year ending after such date by a taxpayer in settlement of a claim arising under the same contract as a claim the settlement of which resulted in the receipt in a subsequent taxable year of an amount to which section 106(b) of such Code applies. If refund or credit of any overpayment resulting from the application of the preceding sentence is prevented on the date of enactment of this Act, or at any time within one year after such date, by the operation of any law or rule of law (other than section 3760 of the Internal Revenue Code of 1939 or section 7121 of the Internal Revenue Code of 1954, relating to closing agreements, and other than section 3761 of the Internal Revenue Code of 1939 or section 7122 of the Internal Revenue Code of 1954, relating to compromises), refund or credit of such overpayment may, nevertheless, be made or allowed if claim therefor is filed within one year after the date of enactment of this Act.

The purpose of the amendment, as stated by the Senate Report, was as follows (S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 115–116 (1958–3 Cum. Bull. 922, 1036–1037)):

* * * * *

> A situation has been called to the attention of your committee where amounts were received during the period 1943 through 1948 inclusive, in settlement of a claim arising under the same contract as one to which section 106 of the 1939 Code applies for years after 1948. In the period from 1943 through 1948 the taxpayer also received the amounts under conditions which led him to believe that the amounts were not includible in his income for tax purposes. For periods since 1948 Congress has already provided in this case that the tax with respect to the claim is to be limited to a maximum tax of 33 percent and that there are to be no penalties for failure to file a return where a timely incomplete return was filed. Your committee's bill extends the latter of these two features to cover the period from 1943 through 1948, but provides for no modification of the tax with respect to amounts received in this earlier period. Thus, the provision added by your committee prevents the application of penalties for failure to file a complete return for the period 1943 through 1948 where the taxpayer had the same reasons to believe no taxes due as he subsequently did with respect to a claim to which section 106 of the 1939 Code was applicable.

This is a further amendment of the amendment made to Section 106 of the 1939 Code by Section 2 of the Act of June 29, 1956 (the Act involved in this case); the 1956 amendment is discussed in the Argument, *supra*, pp. 30–32. The Senate Report quoted above further confirms the assertion in the Argument (*supra*, pp. 30–32) that the 1956 amendment was en-

acted for the benefit of one specific taxpayer who had previously litigated his case in the Tax Court and the court of appeals.

CATEGORY II

Measure Extending the Period for Filing Refund Claims to Seven Years From the Date of Filing the Return

One measure substituted a different period, measured from the date of filing the return, for that provided in Section 322(b)(1) of the 1939 Code.

10. The Act of February 15, 1956, 70 Stat. 15, amended Section 120 of the 1939 Code to provide an unlimited charitable deduction where in the current year and in 8 of the 10 immediately preceding years the individual's contributions to charity, plus his income tax payments, accounted for 90 percent or more of his taxable income, but only if an amount equal to any refund under this provision was paid to, or set aside for, charity. See H. Rep. No. 1596, 84th Cong., 1st Sess. (1956-1 Cum. Bull. 952); S. Rep. No. 1403, 84th Cong., 2d Sess. (1956-1 Cum. Bull. 953). Section 2(d) of this Act provided as follows:

> (d) If a claim for refund relates to an overpayment on account of the amendment made by the first section of this Act, in lieu of the three-year period of limitation prescribed in section 322(b)(1) of the Internal Revenue Code of 1939, the period shall be seven years from the date prescribed by law for filing the return for the year with respect to which the claim is made. In the case of a claim described in this subsection, the amount of the refund may exceed the portion of the tax paid within the period prescribed in paragraph (2) or (3), whichever is applicable of section 322(b) of such code, to the extent of the amount of the overpayment attributable to the amendment made by the first section of this Act.

The Act also provided that no interest would be paid on any overpayment resulting from application of its terms.

CATEGORY III

Amendments Which Extended the Period for Filing Claims for Refund But Made No Change in the Statutory Substantive Law

We have found nine measures which fall within this Category.

11. Section 211 of the Technical Changes Act of 1953, 67 Stat. 615, 625, amended Section 3801 of the 1939 Code, the section relating to mitigation of the effect of the statute of limitations, to provide several additional circumstances in which errors might be corrected in years otherwise closed. The amendment provided:

> SEC. 211. MITIGATION OF EFFECT OF STATUTE OF LIMITATIONS.
>
> (a) *Amendment of Section 3801(b).*—Section 3801(b) (relating to circumstances of adjustment) is hereby amended by inserting after paragraph (5) the following new paragraphs:
>
> "(6) Disallows a deduction or credit which should have been allowed to, but was not allowed to, the taxpayer for another taxable year, or to a related taxpayer; but this paragraph shall apply only if (A) the determination became final on or after June 1, 1952, and (B) credit or refund of the overpayment attributable to the deduction or credit which should have been allowed to the taxpayer or related taxpayer was not barred, by any law or rule of law, at the time the taxpayer first maintained before the Secretary or the Tax Court of the United States, in writing, that he was entitled to such deduction or credit in the taxable year for which it is so disallowed; or
>
> "(7) Requires the exclusion from gross in-

come of an item which is includible in the gross income of the taxpayer for another taxable year or in the gross income of a related taxpayer; but this paragraph shall apply only if (A) the determination became final on or after June 1, 1952, and (B) assessment of deficiency under section 272(a) by the Secretary for such other taxable year or against such related taxpayer was not barred, by any law or rule of law, at the time the Secretary first maintained in a notice of deficiency sent pursuant to section 272(a) or before the Tax Court of the United States, that such item should be included in the gross income of the taxpayer for the taxable year to which the determination relates—."

(b) *Technical Amendments.*—

(1) Paragraph (5) of section 3801(b) is hereby amended by striking out "transaction—" and inserting in lieu thereof "transaction; or".

(2) The second sentence of section 3801(b) is hereby amended by striking out "Such" and inserting in lieu thereof "Except in cases described in paragraphs (6) and (7), such".

(c) *Effective Date.*—The amendments made by subsections (a) and (b) shall be effective as if included in the Internal Revenue Code at the time of its enactment. In any case in which the determination referred to in paragraph (6) or (7) of section 3801(b), as amended by subsection (a) of this section, became final before the date of the enactment of this Act, the one-year period described in section 3801(c) shall be extended to include the one-year period beginning with the date of the enactment of this Act.—

Its purpose was to permit correction of errors in the situation described in paragraphs (6) and (7) even though neither party maintained an inconsistent position, as was required by prior law. See H. Rep.

No. 894, 83d Cong., 1st Sess., pp. 9–10 (1953–2 Cum. Bull. 508, 514–515); S. Rep. No. 685, 83d Cong., 1st Sess. pp. 10–11 (1953–2 Cum. Bull. 526, 532–533). In cases to which this amendment applied, subsection (c) extended the period for claiming refunds or making assessments until one year after the date of enactment of the Technical Changes Act of 1953. It may be noted that the Technical Changes Act of 1953 was enacted on May 15, 1953, and that this amendment applied only to determinations which became final on or after June 1, 1952.

12. Section 202(a)(2) of the Social Security Amendments of 1954, 68 Stat. 1052, 1090, provided in part:

> (2) Section 1401(d)(3) of the Internal Revenue Code of 1939 is amended by striking out the period at the end of the second sentence and inserting in lieu thereof "or, in the case of any agreement (or modification thereof) pursuant to section 218 of the Social Security Act which is effective as of a date more than two years prior to the date such agreement (or modification) was agreed to, within two years after the calendar year in which such agreement (or modification) was agreed to by the State and the Secretary of Health, Education, and Welfare."

Section 1401(d)(3) of the 1939 Code had made special provision for claiming a refund of the employee tax paid on wages in excess of $3,600 in one calendar year after 1950 (the amount then subject to the social security tax) by reason of an employee's having received wages from more than one employer in any such year. Under Section 218 of the Social Security Act, the Secretary of Health, Education and Welfare could, at the request of a State, enter into an agreement with such State for coverage of State and local employees under Social Security. Such agreements had to provide for payment by the State of

amounts equivalent to the sum of the taxes that would have been imposed under Sections 1400 and 1410 of the 1939 Code if the services of the employees had constituted covered employment. Under Section 218 (f), such an agreement, or a modification thereof, might be retroactive. As a result the wages of one who in a prior year was employed both by the State and by another employer might have been subjected to tax (or amounts in lieu of tax) on wages in excess of $3,600.

The purpose and effect of the 1954 amendment are explained by the following excerpt from the House Report (H. Rep. No. 1698, 83d Cong., 2d Sess., p. 82 (1954-2 Cum. Bull. 676, 687):

> Section 1401(d)(3) of the Code presently provides that no special refund shall be made unless (A) the employee makes a claim, establishing his right thereto, after the calendar year in which were received the wages with respect to which refund of tax is claimed, and (B) such claim is made within 2 years after the calendar year in which such wages were received. Paragraph (2) of section 202(a) of the bill amends section 1401(d)(3) of the code so as to provide an exception to this provision in the case of an employee of a State or any political subdivision thereof whose services are covered for purposes of title II of the Social Security Act by reason of an agreement (or modification) pursuant to section 218 of the Social Security Act which is effective as of a date more than 2 years prior to the date such agreement (or modification) was agreed to. It would allow a special refund to be made in the case of such employees, if claim for such refund is made within a period of 2 years after the end of the calendar year in which such agreement

> (or modification) was agreed to by the State and the Secretary of Health, Education, and Welfare.

See also S. Rep. No. 1987, 83d Cong., 2d Sess., pp. 82–83 (1954-2 Cum. Bull. 695, 705).

13. The Act of August 9, 1955, 69 Stat. 594, provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 3416(a) (2) of the Internal Revenue Code of 1939 (relating to period for filing claims for certain floor stocks refunds) is hereby amended by striking out "before August 1, 1954" and inserting in lieu thereof "on or before the sixtieth day after the date of the enactment of H.R. 3712, Eighty-fourth Congress".

The purpose of this amendment is explained by the following excerpt from the House Report (H. Rep. No. 1291, 84th Cong., 1st Sess., p. 1):

> This bill amends section 3416(a)(2) of the Internal Revenue Code of 1939 relating to the period for filing claims for floor stocks refunds with respect to refrigerators, quick-freeze units, and electric, gas, and oil appliances on which the tax was lowered by the Excise Tax Reduction Act of 1954. This bill removes the requirement in the 1939 Code that a claim for a credit or refund with respect to such floor stocks must have been filed before August 1, 1954, and provides instead that the claims for these credits or refunds must be filed on or before the 60th day after the date of enactment of this bill.

See also S. Rep. No. 1145, 84th Cong., 1st Sess., p. 1. The effect of the amendment was to extend for about a year and two months the time for filing claims for refund pursuant to Section 3416(a)(2) of the 1939 Code, which was added to the Code by Section 305(b)

of the Excise Tax Reduction Act of 1954, 68 Stat. 37, 40.

14. Act of August 9, 1955, 69 Stat. 607, P.L. 310:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That if refund or credit of an overpayment resulting from the application of section 345 of the Revenue Act of 1951 (relating to abatement of tax on certain trusts for members of Armed Forces dying in service) is prevented on the date of the enactment of this Act by the operation of any law or rule of law (other than section 3760 of the Internal Revenue Code of 1939 or section 7121 of the Internal Revenue Code of 1954, relating to closing agreements, and other than section 3761 of the Internal Revenue Code of 1939 or section 7122 of the Internal Revenue Code of 1954, relating to compromises), refund or credit of such overpayment may, nevertheless, be made or allowed if claim therefor is filed within one year after the date of the enactment of this Act. No interest shall be allowed or paid on any overpayment if refund or credit of such overpayment would not be allowable but for this Act.

The House Report gave the following reasons for enactment of this bill (H. Rep. No. 1438, 84th Cong., 1st Sess., pp. 1-2 (1955-2 Cum. Bull. 846)):

> Section 345 of the Revenue Act of 1951 provided for a credit or refund of the tax paid on the income of trusts where the income had been accumulated for a member of the military or naval forces of the United States or of one of the other United Nations if the serviceman died in active service in the period December 7, 1941, to January 1, 1948.
>
> No relief was provided in the 1951 act, however, for cases where refunds or credits were barred by the expiration of the period of limita-

tions, by prior court decisions, or for other similar reasons. Your committee is of the opinion that this failure was an oversight, and it believes that it is only equitable to extend treatment equivalent to that provided in section 345 of the Revenue Act of 1951 to cases where refunds or credits were barred by operation of law or rule of law (other than closing agreements or compromises).

It is believed that the revenue loss resulting from the enactment of this bill will be negligible.

This bill has been reported unanimously by your committee.

See also S. Rep. No. 1243, 84th Cong., 1st Sess., p. 1 (1955-2 Cum. Bull. 846–847). The amendment is discussed in the Argument, *supra*, pp. 29–30.

15. The Act of August 1, 1956, 70 Stat. 917, provided:

That if, in the case of property transferred by a decedent dying after February 10, 1939, refund or credit of any overpayment resulting from the application of subsections (a) and (b) of section 7 of the Act entitled "An Act to amend certain provisions of the Internal Revenue Code", approved October 25, 1949 (63 Stat. 891; Public Law 378, Eighty-first Congress), was prevented on October 25, 1949, by the operation of any law or rule of law (other than section 3760 of the Internal Revenue Code of 1939, relating to closing agreements, and other than section 3761 of such Code of 1939, relating to compromises), refund or credit of such overpayment (reduced as provided in section 2) may, nevertheless, be made or allowed if claim therefor is filed within one year from the date of the enactment of this Act.

Sec. 2. The amount of the reduction referred to in the first section of this Act is the amount of gift tax refunded (together with interest paid thereon) by the United States by reason

> of the inclusion in the gross estate of the value of the property causing the overpayment resulting from the application of subsections (a) and (b) of section 7 of the Act approved October 25, 1949.
>
> SEC. 3. No interest shall be allowed or paid on any overpayment resulting from the application of this Act.

The Senate Report contained the following explanation of the bill (S. Rep. No. 2437, 84th Cong., 2d Sess., pp. 2-3 (1956-2 Cum. Bull. 1240-1241)):

> This bill reopens estate-tax cases of persons dying after February 10, 1939, the effective date of the 1939 Code, if refund or credit was prevented on October 25, 1949 (the date of the enactment of the Technical Changes Act of 1949) by any law or rule of law other than a closing agreement or compromise. Your committee's bill is the same as that which passed the House, except that the House bill applied to persons dying after November 11, 1935, and before January 30, 1949; whereas, your committee's bill applies only to persons dying after February 10, 1939, the effective date of the 1939 code. The treatment accorded under this bill is consistent with the rule adopted in the Technical Changes Act of 1949 granting refunds in closed cases of decedents dying after the enactment of the 1939 code where the decedent retained only a reversionary interest having a value of less than 5 percent in the property transferred. This bill will allow refunds in cases where there was also a life estate retained and the reversionary interest had a value of less than 5 percent immediately before the decedent's death.

16. Section 65 of the Technical Amendments Act of 1958, 72 Stat. 1606, 1657, provided:

> SEC. 65. PERIOD OF LIMITATION FOR FILING CLAIM FOR CREDIT FOR STATE DEATH TAXES.

(a) *Period Under 1954 Code.*—Section 2011 (c) (relating to period of limitations on credit for State death taxes) is amended by inserting after paragraph (2) the following new paragraph:

"(3) If a claim for refund or credit of an overpayment of tax imposed by this chapter has been filed within the time prescribed in section 6511, then within such 4-year period or before the expiration of 60 days from the date of mailing by certified mail or registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of any part of such claim, or before the expiration of 60 days after a decision by any court of competent jurisdiction becomes final with respect to a timely suit instituted upon such claim, whichever is later."

(b) *Period Under 1939 Code.*—Section 813 (b) of the Internal Revenue Code of 1939 (relating to period of limitations on credit for State death taxes) is amended by inserting after paragraph (2) the following new paragraph:

"(3) If a claim for refund or credit of an overpayment of tax imposed by this chapter has been filed within the time prescribed in section 910, then within such 4-year period or before the expiration of 60 days from the date of mailing by certified mail or registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of any part of such claim, or before the expiration of 60 days after a decision by any court of competent jurisdiction becomes final with respect to a timely suit instituted upon such claim, whichever is later."

(c) *Effective Dates.*—The amendment made by subsection (a) shall apply with respect to estates of decedents dying after August 16, 1954. The amendment made by subsection (b) shall apply with respect to estates of decedents dying after February 10, 1939, and on or before August 16, 1954.

The purpose and effect of this amendment is explained by the following excerpt from the Report of the Ways and Means Committee (H. Rep. No. 775, 85th Cong., 1st Sess., p. 36 (1958-3 Cum. Bull. 811, 846)):

Under present law a credit is allowed against a portion of the tentative estate tax for State death taxes. These State death taxes generally must be paid within 4 years after the estate tax return is filed in order to be eligible for this credit. However, if an extension of time is granted to pay the Federal estate tax, the State death taxes need not be paid until after this period of extension. Similarly, if a petition for redetermination of a deficiency is filed with the Tax Court within 90 days after notice of a deficiency is mailed, the State death taxes need not be paid until 60 days after the Tax Court's decision becomes final in order to be eligible for credit against the estate tax. However, if the Federal estate tax is paid and then a refund claim is subsequently filed, no extension of time is available under existing law for the payment of State death taxes.

Your committee believes that this is discrimination against those who initially pay a disputed amount and then file claim for refund as against those who take their problem to the courts without paying the disputed amount. As a result, your committee's bill amends section 2011(c) relating to the period of limitation on the credit for State death taxes by adding a new paragraph. This new paragraph provides that where timely claims for refund have been filed with respect to Federal estate taxes, credits for State death taxes can still be claimed if these taxes are paid within 60 days after the Treasury Department has notified the taxpayer of the disallowance of part or all of his claim, or within 60 days after a final decision of a court acting upon this claim.

The 1939 Code is also amended by your committee's bill to provide a similar extension in

> time for the payment of State death taxes for these taxes to be claimed as credits against the Federal estate tax.

See also S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 89-90 (1958-3 Cum. Bull. 922, 1010-1011).

17. Section 96 of the Technical Amendments Act of 1958, 72 Stat. 1606, 1672, provided:

> SEC. 96. EXTENSION OF TIME FOR FILING CLAIMS FOR REFUNDS OF OVERPAYMENTS OF INCOME TAX BASED UPON EDUCATION EXPENSES PAID OR INCURRED IN 1954.
>
> If refund or credit of any overpayment of income tax—
>
> (1) for any taxable year beginning after December 31, 1953, and ending after August 16, 1954, and
>
> (2) resulting from the application of section 162 of the Internal Revenue Code of 1954 (relating to trade or business expenses) insofar as such section relates to expenses described in Income Tax Regulations § 1.162-5 (relating to expenses for education) as promulgated by Treasury Decision 6291 (23 Federal Register 2244),
>
> is prevented on the date of the enactment of this Act, or within 60 days after such date, by the operation of any law or rule of law (other than chapter 74 of the Internal Revenue Code of 1954, relating to closing agreements and compromises), refund or credit or such overpayment may, nevertheless, be made or allowed if claim therefor has been filed on or before such date or is filed within 60 days after such date.

The purpose of this amendment was to give affected taxpayers on opportunity to take advantage of the regulations (§ 1.162-5) issued on April 5, 1958. As the Senate Committee Report states, it was felt the 10 or 11 day interval between the date these regulations were issued and April 15, 1958, the last date on

which many taxpayers could file refund claims for 1954, was not sufficient to permit affected taxpayers to re-examine their 1954 returns and file claims. Accordingly, a 60-day extension was granted. See S. Rep. No. 1983, 85th Cong., 2d Sess., p. 111 (1958-3 Cum. Bull. 922, 1032).

18. Section 98 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1673, provided:

> SEC. 98. EXTENSION OF TIME FOR MAKING REFUND OF OVERPAYMENTS OF INCOME TAX RESULTING FROM ERRONEOUS INCLUSION OF CERTAIN COMPENSATION FOR INJURIES OR SICKNESS.
>
> In the case of any overpayment of income tax resulting from the inclusion as an item of gross income of any amount which was excludable from gross income under section 22(b)(5) of the Internal Revenue Code of 1939 (relating to compensation for injuries or sickness) as an amount received, through accident or health insurance, as compensation for personal injuries or sickness, if claim for credit or refund of such overpayment was filed after December 31, 1951, and within the time prescribed by law, the period prescribed by section 3772(a)(2) of such Code (relating to time for commencing suits for refunds) shall not expire prior to one year after the date of the enactment of this Act.

The Senate Report accompanying the bill explained its purpose (S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 113-114 (1958-3 Cum. Bull. 922, 1034-1035)):

> Section 22(b)(5) of the Internal Revenue Code of 1939 provided in general that amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for personal injuries or sickness were excludable from gross income. However, in the past the Internal Revenue Service has held that sick pay received from a self-insured em-

> ployer's plan did not qualify for this exclusion. Early in 1952, in *Arnold W. Epmeier* v. *United States* (C.A. 7, 1952, 199 F. 2d 508) the court rejected this position and held that sick pay received under one of these self-insured company plans was properly excludable from gross income under section 22(b)(5). On March 26, 1953, however, the Internal Revenue Service issued news release I.R.-047, stating that it did not follow the Epmeier case. On April 1, 1957, the Supreme Court in *Gordon P. Haynes and Essie M. Haynes* v. *United States* (1957, 353 U.S. 81) sustained the position of the Seventh Circuit in the Epmeier case and held that sick payments made under a self-insured company plan qualified for the exclusion under the 1939 Code.

The effect of this amendment was to give taxpayers who had filed timely claims for refund, but who (possibly relying on the position of the Internal Revenue Service) had not filed timely suits for refund, an additional year from the date of enactment to file suits and thereby take advantage of this Court's decision in *Haynes* v. *United States*, 353 U.S. 81 (1957). See S. Rep. No. 1983, *supra*.

19. The Act of September 16, 1959, 73 Stat. 563, provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) section 6511(d)(2)(A) of the Internal Revenue Code of 1954 (relating to special period of limitations with respect to net operating loss carrybacks) is amended by inserting before the period at the end of the first sentence thereof the following: "; except that, with respect to an overpayment attributable to the creation of or an increase in a net operating loss carryback as a result of the elimination of excessive profits by a renegotiation (as defined in section 1481 (a)(1)(A)), the period shall not expire before

September 1, 1959, or the expiration of the twelfth month following the month in which the agreement or order for the elimination of such excessive profits becomes final, whichever is the later".

(b) Section 322(b)(6) of the Internal Revenue Code of 1939 (relating to special period of limitations with respect to net operating loss carrybacks) is amended by inserting before the period at the end of the first sentence thereof the following: "; except that, with respect to an overpayment attributable to the creation of or an increase in a net operating loss carryback as a result of the elimination of excessive profits by a renegotiation (as defined in section 3806(a)(1)(A)), the period shall not expire before September 1, 1959, or the expiration of the twelfth month following the month in which the agreement or order for the elimination of such excessive profits becomes final, whichever is the later".

(c) The amendment made by subsection (a) shall apply with respect to claims for credit or refund resulting from the elimination of excessive profits by renegotiation to which section 6511(d)(2) of the Internal Revenue Code of 1954 applies. The amendment made by subsection (b) shall apply with respect to claims for credit or refund resulting from the elimination of excessive profits by renegotiation to which section 322(b)(6) of the Internal Revenue Code of 1939 applies, but only with respect to claims resulting from renegotiations of excessive profits received or accrued for taxable years ending after December 31, 1952.

SEC. 2. Notwithstanding any period of limitations otherwise applicable, the Secretary of the Treasury or his delegate is authorized and directed to allow credit or refund of an overpayment of $383.64 (claimed on an amended joint return for the calendar year 1951 made June 7, 1954, by Dexter Phillips and Jeanette

H. Phillips and disallowed August 4, 1954, by the examining internal revenue officer) to the extent that such overpayment is attributable to the erroneous inclusion in the gross income shown on their original joint return for such year, made March 11, 1952, of any amount recieved by Dexter Phillips in final distribution of grandfather's estate.

The effect of the amendment made by Section 1 of this Act was to extend either until September 1, 1959 (a date 15 days earlier than the date of this enactment) or for roughly one year after the date of execution of the renegotiation agreement, whichever was later, the period for claiming refunds resulting from net operating loss carrybacks caused or increased by such renegotiation. Its purpose was to permit refunds in cases where such loss was not finally determined until after the normal period for claiming refunds had expired. See S. Rep. No. 663, 86th Cong., 1st Sess., pp. 1–3 (1959–2 Cum. Bull. 866–867).

The purpose of Section 2 of the Act was to authorize and require that a refund of $383.64 be made to a specific taxpayer who had filed a timely claim for refund which, Congress felt, had been erroneously disallowed by the Internal Revenue Service. This taxpayer had failed to file a timely suit for refund. See S. Rep. No. 663, supra, pp. 3–4 (1959–2 Cum. Bull. 866, 867–868).

CATEGORY IV

Amendments Involving Elections

This category includes 13 measures, each of which allowed taxpayers to make an election which would determine the tax treatment of certain items for specified past years, as to some of which the statute of limitations would normally have run. Eight of those provisons (Nos. 20–27) extended the time (both for filing refund claims and for assessing deficiencies) for

periods ranging up to one year (measured from the date of election, the date of publication of final regulations, or the date of enactment). One statute (No. 28) extended the period only for assessments, and another (No. 29) only for refunds. One, the Retirement-Straight Line Adjustment Act of 1958 (No. 30) made no provision for lifting the bar of limitations. The remaining two statutes merely extended the period for making an election under a prior retroactive measure: In one instance (No. 31), the prior statute had granted a one-year grace period from the date of election for claiming refunds and making assessments; the other (No. 32) had not.

20. Section 202 of the Technical Changes Act of 1953, c. 512, 67 Stat. 615, 617 amended Section 24(c)(1) of the 1939 Code to prevent disallowance of a deduction for certain expenses or interest credited by the payor-taxpayer to the account of a related taxpayer, but not paid within the taxable year or within 2½ months after the close thereof, if the amount of such expenses or interest was includible in the payee's income in the year credited or within 2½ months after the close thereof. This amendment was made applicable, at taxpayer's election, to taxable years beginning after December 31, 1945, and before January 1, 1951. (H. Rep. No. 894, 83d Cong., 1st Sess., pp. 3-4 (1953-2 Cum. Bull. 508, 510)):

> In the case of certain closely related taxpayers, such as a corporation and a shareholder owning more than 50 percent of the corporation's stock, section 24(c) of the code operates to disallow deduction of certain expenses and interest if the following conditions are met:
>
> (1) The amount is not paid within the taxable year or within 2½ months after the close thereof; and

(2) Under the recipient's method of accounting the amount is not, unless paid, includible in his income in the taxable year in which, or with which, the taxable year of the payor corporaton ends.

This provision is intended to insure that transactions between such related taxpayers do not operate to shift items of income or deductions. A situation has been called to the attention of your committee, however, where section 24(c) may work an undue hardship. For example, a recipient on the cash basis may have an amount credited to his account and made available to him by the corporate payor within 2½ months after the close of the payor's taxable year so that the recipient must include it in income as an item constructively received in the taxable year so credited. If, however, the corporate taxpayer fails actually to pay over such amount within the period of 2½ months, the item will not be allowed to the corporation as a deduction. Your committee believes that such a case should not fall within the ban of section 24(c) and the bill so provides by an appropriate amendment of requirement (1) above.

The amendment is applicable to taxable years of the payor beginning after December 31, 1950, but under certain conditions, set forth to insure that payments will be properly accounted for taxwise with respect to both parties, the payor may elect to make this amendment applicable to taxable years beginning after December 31, 1945, and before January 1, 1951.

See also S. Rep. No. 685, 83d Cong., 1st Sess., p. 4 (1953-2 Cum. Bull. 526, 528).

The portion of the amendment reopening the period for making assessments, and in certain cases for claiming refunds, provided as follows:

The periods of limitation provided in sections 275 and 276 of the Internal Revenue Code on

the making of an assessment and the beginning of distraint or a proceeding in court for collection shall, with respect to any deficiency and interest thereon resulting from any consent filed pursuant to subparagraph (B), include one year immediately following the date such consent is filed, and such assessment and collection may be made notwithstanding any provision of law or any rule of law which otherwise would prevent such assessment and collection. If an election by a payor should be filed for a taxable year of the payor for which allowance of credit or refund of an overpayment is barred (at the time of such filing) by any law or rule of law, any consent filed by the payee in respect of any amount which represents expenses incurred or interest accrued by the payor for such year shall be void. If a consent requires the inclusion in the gross income of the payee for any taxable year of an amount which was erroneously included in the gross income of the payee for another taxable year and, on the date the consent is filed, correction of the effect of the error is prevented by the operation of any provision of the internal-revenue laws other than section 3761 of the Internal Revenue Code (relating to compromises), then the effect of the error shall be corrected in accordance with section 3801 of the Internal Revenue Code as if the consent were a determination under such section 3801 in which there is adopted a position maintained by the Secretary of the Treasury. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the provisions of this paragraph.

Stanley S. Surrey, in his article *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted*, 70 Harv. L. Rev. 1145 (1957), disclosed the probable reason both for the retroactive feature of the

amendment and for the extension of the limitations period:

> Section 24(c) of the Internal Revenue Code of 1939, as amended, 67 Stat. 617 (now § 267 (a)) allowed the deduction of an accrued expense if the related payee included the amount in income within two-and-one-half months after the close of the year and applied the change retroactively to 1946. The retroactive aspect, and perhaps the proposal, appear to be a consequence of the litigation in *L. R. McKee,* 18 T.C. 512 (1952), *rev'd per curiam,* 207 F. 2d 780 (8th Cir. 1953), in which the taxpayer had been unsuccessful in the Tax Court under the previous provisions.

21. Section 210 of the Technical Changes Act of 1953, 67 Stat. 615, 624, permitted a surviving spouse to elect to have the marital deduction provisions of Section 812(e)(1) of the 1939 Code apply to certain interests in property which otherwise failed to meet the requirements of Section 812(e)(1). If such an election was made, the surviving spouse was treated as having general power of appointment with respect to property covered by the election, which meant the property would be includible in the estate of the surviving spouse. The provision applied only with respect to estates of decedents dying in the short period between January and April of 1948. Congress' attention had been called to "certain situations" in which a decedent who died during this short period was not able to obtain the benefit of the marital deduction provisions "because the will of the decedent was not in accord with certain technical requirements of the act." H. Rep. No. 894, 83d Cong., 1st Sess., p. 9 (1953-2 Cum. Bull. 508, 514); S. Rep. No. 685, 83d Cong., 1st Sess., p. 9 (1953-2 Cum. Bull. 526, 532). Subsections (c) and (d) of this measure provided as follows:

(c) *Interest.*—No interest shall be allowed or paid on any overpayment resulting from the application of this section.

(d) *Effective Date.*—This section shall apply only with respect to estates of decedents dying after December 31, 1947, and on or before the date of the enactment of the Revenue Act of 1948. If refund or credit of any overpayment resulting from the application of subsections (a) and (b) is prevented on the date of the enactment of this Act, or within one year from such date, by the operation of any law or rule of law (other than section 3760 of the Internal Revenue Code, relating to closing agreements, and other than section 3761 of such code, relating to compromises), refund or credit of such overpayment may, nevertheless, be made or allowed if claim therefor is filed within one year from the date of the enactment of this Act.

If an election to have this provision apply was made, subsection (b) permitted assessment and collection of deficiencies within a year following the date of such election "notwithstanding any provision of law or any rule of law which otherwise would prevent such assessment and collection."

22. Section 29 of the Technical Amendments Act of 1958, 72 Stat. 1606, 1626, retroactively amended Section 481 of the 1954 Code so as to require taxpayers who had initiated a change in accounting method to make certain adjustments for 1939 Code years to prevent income or expenses from being included or deducted more than once. To prevent hardship from retroactive application of this rule, subsection (e) permitted taxpayers who had initiated changes in accounting method (possibly relying on the fact that Section 481 as originally enacted had not required such adjustments) to elect within six

months to return to their former methods of accounting. Subparagraph (2) of subsection (e) provided as follows:

> (2) *Statute Of Limitations.*—If assessment of any deficiency for any taxable year resulting from an election under paragraph (1) is prevented on the date on which such election is made, or at any time within one year after such date, by the operation of any law or rule of law, such assessment may, nevertheless, be made if made within one year after such date. An election by a taxpayer under paragraph (1) shall be considered as a consent to the assessment pursuant to this paragraph of any such deficiency. If refund or credit of any overpayment of income tax resulting from an election under paragraph (1) is prevented on the date on which such election is made, or at any time within one year after such date, by the operation of any law or rule of law, refund or credit of such overpayment may, nevertheless, be made or allowed if claim therefor is filed within one year after such date.

See S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 44–49 (1958–3 Cum. Bull. 922, 965–70).

23. Section 37 of the Technical Amendments Act of 1958, 72 Stat. 1606, 1633, amended Section 614 of the 1954 Code to permit taxpayers to elect in certain cases to aggregate separate operating mineral interests and in certain other cases to treat a single interest as more than one property for purposes of computing the depletion allowance. An election could be made for all years governed by the 1954 Code, except for years as to which assessment of deficiencies was barred on the date of enactment of the Technical Amendments Act of 1958. The following provisions applied to taxpayers who made the election described above:

(E) *Statute Of Limitations.*—If the taxpayer makes an election pursuant to subparagraph (B) and if assessment of any deficiency for any taxable year resulting from such election is prevented on the first day of the first month which begins more than 90 days after the date of publication in the Federal Register of final regulations issued under authority of this subsection, or at any time within one year after such day, by the operation of any law or rule of law, such assessment may, nevertheless, be made if made within one year after such day. An election by a taxpayer pursuant to subparagraph (B) shall be considered as a consent to the assessment pursuant to this subparagraph of any such deficiency. If refund or credit of any overpayment of income tax resulting from an election made pursuant to subparagraph (B) is prevented on such day, or at any time within one year after such day, by the operation of any law or rule of law, refund or credit of such overpayment may, nevertheless, be made or allowed if claim therefor is filed within one year after such day. This subparagraph shall not apply to any taxable year in respect of which an assessment of a deficiency, or a refund or credit of an overpayment, as the case may be, is prevented by the operation of any law or rule of law on the date of the enactment of the Technical Amendments Act of 1958.

See S. Rep. No. 1983, 85th Cong., 2d Sess., p. 60 (1958-3 Cum. Bull. 922, 981).

24. Section 63 of the Technical Amendments Act of 1958, 72 Stat. 1606, 1649, provided that the election of an unincorporated business enterprise to be taxed as a corporation, pursuant to the provisions of Section 1361 of the 1954 Code, would be considered valid if filed in accordance with regulations promulgated under that section, and permitted a taxpayer to revoke such an election on or before the "last day of

the third month following the month in which regulations prescribed under such section 1361 are published in the Federal Register." The primary purpose of this measure was to make certain that an election to be taxed as a corporation would not be binding on a taxpayer before final regulations were published. See S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 86–87 (1958–3 Cum. Bull. 922, 1007–1008). With respect to the statute of limitations, subparagraph 1(b) of Section 63 provided:

> (b) *Tolling of Statute of Limitations.*—In the case of any election referred to in subsection (a) with respect to any unincorporated business enterprise—
>
> (1) The statutory period for the assessment of any deficiency against any taxpayer for any taxable year, to the extent such deficiency is attributable to such enterprise and to the period to which such election applies (or would apply but for a revocation under subsection (a), shall not expire before the expiration date specified in subsection (c); and such deficiency may be assessed at any time on or before such expiration date, notwithstanding any law or rule of law which would otherwise prevent such assessment.
>
> (2) If credit or refund of the amount of any overpayment is prevented, at any time on or before the expiration date specified in subsection (c), by the operation of any law or rule of law (other than chapter 74 of the Internal Revenue Code of 1954, relating to closing agreements and compromises), credit or refund of such overpayment may, nevertheless, be allowed or made, to the extent such overpayment is attributable to such enterprise and to the period referred to in paragraph (1), if claim therefor is filed on or before the expiration date specified in subsection (c).

(c) *Expiration Date Defined.*—For purposes of subsection (b), the term "expiration date" means that day which is one year after whichever of the following days is the earlier:

(1) The last day of the third month following the month in which regulations prescribed under section 1361 of the Internal Revenue Code of 1954 are published in the Federal Register; or

(2) if the election is revoked under subsection (a), the day on which such revocation is filed with the Secretary of the Treasury or his delegate.

25. Dealer Reserve Income Adjustment Act of 1960, 74 Stat. 124, was a legislative response to this Court's decision in *Commissioner* v. *Hansen,* 360 U.S. 446, decided on June 22, 1959, which held that an accrual basis taxpayer was required to report dealer reserve income in the year it was credited to a dealer reserve account on the books of the finance company, normally at the time of sale of installment paper to the finance company following sale of the property. Prior to that decision many dealers, relying on a number of court decisions, had not reported this income until the reserves were withdrawn by the dealers from the finance companies. The Act gave dealers who elected under it on or before September 1, 1960, two alternatives for paying tax on the income not previously reported: (i) They could treat the correction of the method of reporting the reserved income as a required change in method of accounting in the earliest taxable year open on June 22, 1959, in which case no adjustment would be required for reserves accumulated in 1939 Code years otherwise closed; or (ii) deficiencies could be computed for all years open on June 21, 1959, and the resulting deficiencies paid in installments. See S. Rep. No. 1045, 86th Cong., 2d Sess., pp. 1–2 (1960–1 Cum. Bull.

826, 827–829). Subsection 5(e) of this Act provided as follows:

> (e) *Statutes of Limitations.*—
>
> (1) *Extension of period for assessment and refund or credit.*—For purposes of applying sections 3 and 4 of this Act, if the assessment of any deficiency, or the refund or credit of any overpayment, for any taxable year was not prevented on June 21, 1959, by the operation of any law or rule of law, but would be so prevented prior to September 1, 1961, the period within which such assessment, or such refund or credit, may be made shall not expire prior to September 1, 1961. An election by a taxpayer under section 3 or 4 of this Act shall be considered as a consent to the application of the provisions of this subsection.
>
> (2) *Years Closed By Closing Agreement Or Compromise.*—For purposes of this Act, if the assessment of any deficiency, or the refund or credit of any overpayment, for any taxable year is prevented on the date of an election under section 3 or 4 of this Act by the operation of the provisions of chapter 74 of the Internal Revenue Code of 1954 (relating to closing agreements and compromises) or by the corresponding provisions of the Internal Revenue Code of 1939, such assessment, or such refund or credit, shall be considered as having been prevented on June 21, 1959.

The effect of subsection 5(e) is explained by the following excerpt from the Senate Report (S. Rep. No. 1045, 86th Cong., 2d Sess., p. 12 (1960–1 Cum. Bull. 826, 835)):

> Subsection (e) of section 5, as amended by your committee, for which there is no corresponding provision in the House bill, provides that, for purposes of applying sections 3 and 4 of the bill, if assessment of any deficiency or credit or refund of any overpayment for

any taxable year was not prevented on June 21, 1959, by the operation of any law or rule of law (other than the provisions of ch. 74 of the Internal Revenue Code of 1954, relating to compromises or closing agreements, or the corresponding provisions of prior laws) the period within which such assessment or credit or refund may be made shall not expire prior to July 1, 1961. This subsection will permit, notwithstanding any law or rule of law other than the provisions of chapter 74 of the code (relating to compromises or closing agreements), the assessment of any deficiency, or credit or refund of any overpayment, in respect of any taxable year to which section 3 or 4 is otherwise applicable, if such assessment, credit, or refund was not prevented with respect to such year on June 21, 1959. For example, if credit or refund for a specified year was not prevented by the statute of limitations, or a judicial decision that had become final, on June 21, 1959, but would (except for this subsection) be prevented on a later date, such as September 1, 1959, then for purposes of applying section 3 or 4 credit or refund may, nevertheless, be made with respect to such year if the taxpayer exercises his election prior to July 1, 1960, and files claim for credit or refund prior to July 1, 1961. This subsection does not suspend the period of limitation with respect to any taxable year closed by operation of a compromise or closing agreement nor reopen any taxable year in respect of which the statute of limitations had expired before June 21, 1959. The provision does not shorten the period of limitation otherwise applicable.

26. Section 23 of the Revenue Act of 1962, 76 Stat. 960, 1065:

SEC. 23. EFFECTIVE DATE OF SECTION 1371(c) OF THE INTERNAL REVENUE CODE OF 1954.

(a) *In General.*—Subject to the provisions of subsection (b), section 1371(c) of the Internal Revenue Code of 1954 (as added by section 2(a) of the Act entitled "An Act to amend the Internal Revenue Code of 1954 to provide a personal exemption for children placed for adoption and to clarify certain provisions relating to the election of small business corporations as to taxable status", approved September 23, 1959 (Public Law 86–376)), shall (notwithstanding the provisions of the first sentence of section 2(d) of such Act) also apply to taxable years beginning after December 31, 1957, and before January 1, 1960.

(b) *Election and Consent by Corporations; Consents by Shareholders.*—Subsection (a) shall apply with respect to any corporation and its shareholders only if, within one year after the date of the enactment of this Act—

(1) such corporation (in such manner as the Secretary of the Treasury or his delegate prescribes by regulations) elects to have the provisions of subsection (a) apply and consents to the application of subsection (c); and

(2) each person who is a shareholder of such corporation on the date on which such corporation makes such election, and each person who was a shareholder of such corporation during any taxable year of such corporation beginning after December 31, 1957, and ending before the date of such election, consents (in such manner and at such time as the Secretary of the Treasury or his delegate prescribes by regulations) to such election and to the application of subsection (c).

(c) *Tolling of Statutes of Limitations.*—In any case in which a corporation makes an election under subsection (b)—

(1) if the assessment of any deficiency against the corporation making such election, or any shareholder of such corporation who consents to such election, for any taxable year is prevented, at any time on or before the expiration of one year after the date of such election, by the operation of any law or rule of law, assessment of such deficiency may, nevertheless, be made, to the extent such deficiency is atttributable to the application of subsection (a), at any time on or before the expiration of such one-year period; and

(2) if credit or refund of any overpayment of tax by the corporation making such election, or any shareholder of such corporation who consents to such election, for any taxable year is prevented, at any time on or before the expiration of one year after the date of such election, by the operation of any law or rule of law, credit or refund of such overpayment may, nevertheless, be allowed or made, to the extent such overpayment is attributable to the application of subsection (a), if claim therefor is filed on or before the expiration of such one-year period.

The purpose of this amendment was simply to extend application of the Act of September 23, 1959, 73 Stat. 699 (which provided that in certain cases spouses were treated as one shareholder of a Subchapter S corporation), to cover taxable years beginning in 1958 and 1959. The Act had previously been effective only with respect to taxable years beginning after December 31, 1959. See S. Rep. No. 1881, 87th Cong., 2d Sess., pp. 128–129 (1962–3 Cum. Bull. 707, 834–835).

The Conference Report, H. Conference Rep. No. 2508, 87th Cong., 2d Sess., p. 45 (1962–3 Cum. Bull.

1129, 1173) contained the following explanation of subsection (c), relating to the statute of limitations:

> The amendment also provides that where a special election (and the requisite consents) has been made, the statute of limitations for assessing additional tax against the corporation or the shareholders attributable to the earlier effective date of section 1371(c) (and the statute of limitations for allowing a credit or refund of any overpayment of tax by the corporation or its shareholders attributable to the earlier effective date of section 1371(c)) is to remain open, or be opened, for 1 year following the date of the election. The House recedes.

27. Section 1 of the Act of October 23, 1962, 76 Stat. 1158, provided that in computing the taxable income of a terminal railroad corporation, such corporation is not deemed to have accrued or received amounts owed to it for certain terminal services performed for a railroad shareholder, to the extent railroad terminal income is credited against these amounts. Under this provision, railroad shareholders are not to be taxed on the portion of the charge satisfied with related terminal income, or permitted to receive a deduction as having paid such portion.

As reported by the House Ways and Means Committee, this measure was silent with respect to the limitations problem, although retroactive to all 1939 Code years. The committee report commented on this circumstance as follows (H. Rep. No. 2326, 87th Cong., 2d Sess., p. 5):

> The amendments made by your committee apply to all years to which the Internal Revenue Code of 1954 or the Internal Revenue Code of 1939 apply. However, your committee does not believe it necessary or desirable to reopen any years closed on the date of the enact-

ment of the bill. Accordingly, the effective date provision does not refer to the sections which contain the period of limitation for filing claims for credit or refund or which otherwise provide for the closing of taxable years, and therefore, the bill does not have the effect of opening any closed years.

As reported by the Senate Finance Committee, however, the bill was amended so that an election thereunder reopened barred years (unless closed by closing agreement or compromise) both for the claiming of refunds (if claim was filed within one year of enactment) and for assessing the correlative deficiencies. (See S. Rep. No. 2273, 87th Cong., 2d Sess. (1962-3 Cum. Bull. 1216)). This amendment was accepted in Conference and, as enacted, subsection (e) of Section 281 of the 1954 Code added by this amendment, provided as follows:

(e) *Application to Taxable Years Ending Before the Date of Enactment.*—In the case of any taxable year ending before the date of the enactment of this section—

(1) this section shall apply only to the extent that the taxpayer computed on its return, filed at or prior to the time (including extensions thereof) that the return for such taxable year was required to be filed, its taxable income in the manner described in subsection (a) in the case of a terminal railroad corporation, or in the manner described in subsection (b) in the case of a shareholder of a terminal railroad corporation; and

(2) this section shall apply to a taxable year for which the assessment of any deficiency, or for which refund or credit of any overpayment, whichever is applicable, was prevented, on the date of the enactment of this section, by the operation of any law or rule of law (other than section 3760 of the Internal Revenue Code of 1939 or section 7121 of this title, re-

lating to closing agreements, and section 3761 of the Internal Revenue Code of 1939 or section 7122 of this title, relating to compromises), only—

(A) to the extent any overpayment of income tax would result from the recomputation of the taxable income of a terminal railroad corporation in the manner described in subsection (a),

(B) if claim for credit or refund of such overpayment, based upon recomputation, is filed prior to one year after the date of the enactment of this section,

(C) to the extent that paragraph (1) applies, and

(D) if each shareholder of such terminal railroad corporation consents in writing to the assessment, within such period as may be agreed upon with the Secretary or his delegate, of any deficiency for any year to the extent attributable to the recomputation of its taxable income in the manner described in subsection (b) correlative to its allocable share of the adjustment of taxable income made by the terminal railroad corporation in its recomputation under subparagraph (A).

28. Section 36 of the Technical Amendments Act of 1958, 72 Stat. 1606, 1633, amended Section 613 of the 1954 Code to make 1954 Code depletion rates applicable, at taxpayer's election, to that portion of a taxable fiscal year falling within calendar year 1954, in the case of fiscal years ending in 1954 to which the Internal Revenue Code of 1939 was otherwise applicable. Subsection (b) of this amendment provided as follows:

(b) *Statute of Limitations, etc.; Interest.*—If refund or credit of any overpayment resulting from the application of the amendment made by subsection (a) of this section is prevented on the date of the enactment of this

Act, or within 6 months from such date, by the operation of any law or rule of law (other than section 3760 of the Internal Revenue Code of 1939 or section 7121 of the Internal Revenue Code of 1954, relating to closing agreements, and other than section 3761 of the Internal Revenue Code of 1939 or section 7122 of the Internal Revenue Code of 1954, relating to compromises), refund or credit of such overpayment may, nevertheless, be made or allowed if claim therefor is filed within 6 months from such date. No interest shall be paid on any overpayment resulting from the application of the amendment made by subsection (a) of this section.

The purpose of the amendment, including the provision with respect to the statute of limitations, was explained by the Ways and Means Committee as follows: (H. Rep. No. 775, 85th Cong., 1st Sess., p. 24 (1958–3 Cum. Bull. 811, 834):

The 1954 Code percentage-depletion rates are effective January 1, 1954, for calendar year taxpayers. In the case of fiscal year taxpayers, however, the 1954 Code percentage-depletion rates are available only in case of fiscal years beginning after December 31, 1953, and ending after August 16, 1954.

This section amends section 613 of the Code to allow a taxpayer on a fiscal year basis to elect to apply the percentage-depletion rates specified in the 1954 Code to that portion of a fiscal year 1953–54 after December 31, 1953. It also makes this treatment available in the case of short years beginning in 1954 and ending on or before August 16, 1954.

* * * * *

The provision will provide for the application of the 1939 Code percentage-depletion rates for the part of the fiscal year (computed on a daily basis) which falls in the calendar year 1953 and

the 1954 Code rates for that part of the calendar year 1954.

The provision opens, or keeps open, the statute of limitations for purposes of this amendment for 6 months after the enactment of the bill. No interest, however, is to be paid with respect to overpayments resulting from this provision.

This provision is expected to result in a one-time revenue loss of approximately $1.5 million.

29. Section 99 of the Technical Amendments Act of 1958: 72 Stat. 1606, 1673,[2] *provided:*

SEC. 99. AMOUNTS RECEIVED BY CERTAIN MOTOR CARRIERS IN SETTLEMENT OF CLAIMS AGAINST THE UNITED STATES.

Notwithstanding the provisions of section 42 of the Internal Revenue Code of 1939, an amount received in settlement of any claim against the United States arising out of the taking by the United States (pursuant to Executive Order Numbered 9462, dated August 11, 1944 (3 C.F.R., 1943–1948, p. 322)) of possession or control of any motor carrier transportation system owned or operated by the taxpayer shall, at the election of the taxpayer, under regulations prescribed by the Secretary of the Treasury or his delegate, be deemed to be income which was received or accrued in the taxable years during which such motor carrier transportation system was in the possession or control of the United States. The election referred to in the preceding sentence shall be made, under regulations prescribed by the Secretary of the Treasury or his delegate, within one year after the date of the enactment of this

[2] This provision, though cited in the government's petition for certiorari (at p. 40), was not included in the tabulation therein.

> Act, and, if made, shall be irrevocable. The period for assessment of any deficiency attributable to the inclusion of income in any taxable year of the taxpayer by reason of the application of this section shall not expire prior to one year after the date on which the taxpayer makes the election referred to in the first sentence, notwithstanding the provisions of section 275 of the Internal Revenue Code of 1939 or any other provision of law or rule of law which would otherwise prevent such assessment. Notwithstanding section 292 of the Internal Revenue Code of 1939, no interest shall be assessed or collected for any period priod to March 15, 1953, with respect to that part of any deficiency which is attributable to the inclusion of income in any taxable year by reason of the application of this section.

This amendment appears to have been a legislative response to the decision in *Midwest Motor Express* v. *Commissioner*, 251 F. 2d 405 (C.A. 8th, 1958), in which the court held that the kind of payments covered by the amendment were fully taxable in 1952, the year in which they were received. See S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 114–115 (1958–3 Cum. Bull. 922, 1035–1036).

30. Section 94 of the Technical Amendments Act of 1958, 72 Stat. 1606, 1670, was enacted for the reasons explained in the following excerpt from the Report of the Senate Finance Committee: (S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 107–108 (1958–3 Cum. Bull. 922, 1028–1029)):

> Prior to 1942, class I railroads for many years employed the retirement method of computing depreciation on roadway assets for income-tax purposes, as well as reporting to the Interstate Commerce Commission on this basis. These roadway assets include buildings, bridges, tunnels, water towers, etc., but not the

rolling stock, roadbed, or the track. Instead of taking depreciation as the asset is used, under the retirement method, the original cost of an asset (less salvage value) is charged off against income at the time of the retirement of the asset from use. In 1942, the Interstate Commerce Commission ordered class I railroads to change, not later than January 1, 1943, from the retirement method of computing depreciation on roadway assets to the straight-line method. Under the straight-line method of computing depreciation, the original cost of an asset (less salvage value) is charged against income by means of annual deductions over its useful life.

Because of the Interstate Commerce Commission's order, and because during World War II these assets were needed and, therefore, were not retired and charged off against income, the railroads asked the Commissioner of Internal Revenue to permit them to change over, for income-tax purposes, to the straight-line method of computing depreciation. Permission was granted, but only on the condition that the railroads establish a reserve generally of 30 percent of the cost of the roadway assets. The effect of this reserve was to limit the remaining amount which could be recovered by depreciation to the cost of these assets reduced by the 30-percent reserve. Although the railroads objected to this condition, many of them finally agreed to the establishment of this reserve imposed by the so-called terms letters. The changeovers to the new method of computing depreciation occurred, generally, in 1942 and 1943. A number of court decisions have dealt with the tax effects of the retirement method of computing depreciation and with the tax effects in changing from this method of depreciation to another. These decisions relate to a number of different issues and involve widely varying factual situations. They have,

however, thrown some doubt upon the validity of the 30-percent reserve requirement imposed upon the railroads under the terms letters. As a result, the railroads and the Internal Revenue Service have been engaged in a continuing controversy over the tax effects of this change in method of computing depreciation. The amendment made by the House bill is, in essence, a settlement of this controversy.

Subsection (f), one of a number of very complicated subsections, provided as follows:

> (f) *Equity Invested Capital, etc.*—If an election is made under this section, then (notwithstanding the terms and conditions prescribed by the Commissioner in connection with the changeover)—
>
> (1) *Equity invested capital.*—In determining equity invested capital under sections 458 and 718 of the Internal Revenue Code of 1939, accumulated earnings and profits as of the changeover date, and as of the beginning of each taxable year thereafter, shall be reduced by the depreciation sustained before March 1, 1913, as computed under subsection (d)(1)(B); and
>
> (2) *Definition of equity capital.*—In determining the adjusted basis of assets for the purpose of section 437(c) of the Internal Revenue Code of 1939 (and in addition to any other adjustments required by such Code), the basis shall be reduced by depreciation sustained before March 1, 1913 (as computed under subsection (d)), together with any depreciation allowable under subsection (e)(2) for any period before the year for which the excess profits credit is being computed.

The question whether Section 94 extended *sub silentio* the time for filing claims for refund is now pending before the Court of Claims. *New York, Chicago*

& St. Louis Railroad Co. v. United States, C. Cls. No. 385–61.

31. Section 103 of The Technical Changes Act of 1953, 67 Stat. 615, 616:

> SEC. 103. EXTENSION OF TIME FOR MAKING ELECTION WITH RESPECT TO WAR-LOSS RECOVERIES.
>
> Section 127(c)(5) (relating to election with respect to war-loss recoveries) is hereby amended by striking out "December 31, 1952" and inserting in lieu thereof "December 31, 1953".

The purpose and effect of this amendment were as follows (H. Rep. No. 894, 83d Cong., 1st Sess., p. 2 (1953–2 Cum. Bull. 508, 509)):

> Section 341 of the Revenue Act of 1951 sets forth a new method for treatment of war losses under section 127 of the Internal Revenue Code. It provides that at the election of the taxpayer (under such regulations as the Secretary may prescribe) the tax for the year in which the deduction for the war loss was taken is to be recomputed by reducing the deduction by the amount of the recovered property taken at its depreciated cost on the date of the loss or at its fair market value on the date of recovery, whichever is lower. The resulting increase in tax for the year of the loss, if any, is added to the tax for the year of recovery. The time for electing the benefit of this provision expired on December 31, 1952. Since the Treasury Regulations interpreting this section of the law were not promulgated until December 30, 1952, taxpayers did not have sufficient time to determine whether it was advantageous to make such an election. The bill extends the period for making such an election through December 31, 1953.

The provision of Section 127(c)(5) of the 1939 Code relating to the time for filing claims for refund stated:

> If pursuant to such election the provisions of paragraph (3) are applicable to any taxable year—
>
> (A) the period of limitations provided in sections 275 and 276 on the making of assessments and the beginning of distraint or a proceeding in court for collection shall not, with respect to—
>
> (i) the amount to be added to the tax for such taxable year under the provisions of paragraph (3), and
>
> (ii) any deficiency for such taxable year or for any other taxable year, to the extent attributable to the basis of the recovered property being determined under the provisions of subsection (d)(2),
>
> expire prior to the expiration of two years following the date of the making of such election, and such amount and such deficiency may be assessed at any time prior to the expiration of such period notwithstanding any law or rule of law which would otherwise prevent such assessment and collection, and
>
> (B) in case refund or credit of any overpayment resulting from the application of the provisions of paragraph (3) to such taxable year is prevented on the date of the making of such election, or within one year from such date, by the operation of any law or rule of law (other than section 3761, relating to compromises), refund or credit of such overpayment may, nevertheless, be made or allowed if claim therefor is filed within one year from such date.

Hence in extending the time for making an election under Section 127(c)(5), Congress also extended the time for claiming refunds and assessing deficiencies

for taxable years beginning after December 31, 1941, the years to which Section 127(c)(5) applied.

32. Section 102 of the Technical Changes Act of 1953, *supra*, 67 Stat. 615, 616:

> SEC. 102. EXTENSION OF TIME TO MAKE ELECTION IN RESPECT OF EXCESSIVE DEPRECIATION ALLOWED FOR PERIODS BEFORE 1952.
>
> (a) *Amendment of Section 113(d).*—So much of section 113(d) (relating to election in respect of depreciation, etc., allowed before 1952) as follows the first sentence thereof is hereby amended to read as follows: "Such an election shall be made in such manner as the Secretary may by regulations prescribe and shall be irrevocable when made, except that an election made on or before December 31, 1952, may be revoked at any time before January 1, 1955. A revocation of an election shall be made in such manner as the Secretary may by regulations prescribe, and no election may be made by any person after he has so revoked an election. The election shall apply in respect of all property held by the person making the election at any time on or before December 31, 1952, and in respect of all periods since February 28, 1913, and before January 1, 1952, during which such person held such property or for which adjustments must be made under subsection (b)(2). An election or a revocation of an election by a transferor, donor, or grantor made after the date of the transfer, gift, or grant of property shall not affect the basis of such property in the hands of the transferee, donee, or grantee. No election may be made under this subsection after December 31, 1954."
>
> (b) *Effective Date.*—The amendment made by subsection (a) shall be effective as if included in the amendment made by section 2 of Public Law 539, Eighty-second Congress, at the time of its enactment.

The reason for the amendment was explained by the Ways and Means Committee as follows (H. Rep. No. 894, 83d Cong., 1st Sess., p. 2 (1953-2 Cum. Bull. 508, 509)):

> In Public Law 539, approved July 14, 1952, Congress overruled the decision of the Supreme Court in the Virginian Hotel case. Under that decision a taxpayer who deducted depreciation for any year in excess of the amount allowable for such year was nevertheless required to reduce the basis of his property by the entire amount of depreciation allowed, even though he had received no tax benefit from claiming such excessive depreciation as a deduction. Under Public Law 539, the basis of the property was not required to be reduced by such excessive depreciation unless the taxpayer had received a tax benefit for taking a deduction for such excessive amount. The taxpayer was granted under the law an election (under such regulations as the Secretary prescribed) to apply this new treatment retroactively to the period since February 28, 1913, and before January 1, 1952, but no election could be made after December 31, 1952. The Treasury Regulations under the law were not promulgated until December 30, 1952. Thus taxpayers were not given sufficient time to determine whether such an election would be beneficial to them. Your committee therefore deems it desirable to extend through December 31, 1954, the time within which an election may be made. Since Public Law 539 provides that an election once made is irrevocable, the bill, in order to provide uniform treatment permits taxpayers to revoke within the extended period elections made prior to January 1, 1953.

See also S. Rep. No. 685, 83d Cong., 1st Sess. (1953-2 Cum. Bull. 526-527).

Public Law 539, 66 Stat. 629, the Act amended by this measure, was enacted on July 14, 1952 to overrule this Court's decision in *Virginian Hotel Corp.* v.

Helvering, 319 U.S. 523 (1943), and was made applicable (by Section 3) to taxable years ending after December 31, 1931, a number of which, of course, were barred on the date of its enactment. Yet, the Senate Report on the 1952 bill (S. Rep. No. 1160, 82d Cong., 2d Sess., p. 2 (1952-2 Cum. Bull. 370, 371)) explicitly stated that the measure applied only to open years and did not lift the bar of the statute of limitations:

> The bill as passed by the House would have corrected the effects of the Virginian Hotel decision only with respect to the computation of tax liabilities for taxable years beginning after December 31, 1947.
>
> Your committee has amended the bill so as to provide that the amendment may be applicable to taxable years beginning after December 31, 1931, rather than December 31, 1947, as the House version provides. This will reinstate the intent of Congress with respect to section 113(b)(1)(B) of the Revenue Acts of 1932, 1934, 1936, and 1938 and the Internal Revenue Code. Since the principle embodied in the bill has been endorsed by the House and by this committee, it seemed desirable to extend that principle *to all open years* to which it is applicable. Retroactive application to these years will remedy the injustice of the *Virginian Hotel* decision as fully as is possible *without lifting the bar of the statute of limitations.* If the amendment were made applicable in all cases for all taxable years ending after December 31, 1931, however, the effect might have been to reduce the excess profits credits of certain taxpayers without providing for a proportionate reduction of their excess profits net income; and in other cases the effect might have been to prevent taxpayers from taking advantage of some of the relief provisions of the present excess profits tax law, without affording them corresponding advantages. For

those reasons the application of the amendment to periods before January 1, 1952, is made elective, so that no taxpayer be hurt by retroactive legislation. [Emphasis supplied.]

CATEGORY V

Measures Which Amended or Added to the Statutory Substantive Law With Respect to Years Ordinarily Barred, But Contained No Provision Extending the Limitations Period

We have found fifteen measures enacted during 1953–1962 which fell within this category. Nine of them (Nos. 33–41) prohibited payment of interest on refunds made pursuant to their terms; the other six did not.

33. Section 209 of the Technical Changes Act of 1953, *supra,* 67 Stat. 615, 624, provided:

> SEC. 209. REVERSIONARY INTERESTS IN CASE OF LIFE INSURANCE.
>
> (a) *Decedents Dying After January 10, 1941, and Before October 22, 1942.*—Effective with respect to estates of decedents dying after January 10, 1941, and before October 22, 1942, the proceeds of life insurance receivable by beneficiaries other than the executor shall not be included in the gross estate of a decedent under section 811(g) of the Internal Revenue Code unless such proceeds would have been includible under section 404(c) of the Revenue Act of 1942 (as amended by section 503(a) of the Revenue Act of 1950) had such section 404(c), as so amended, applied to such estate.
>
> (b) *Interest.*—No interest shall be allowed or paid on any overpayment resulting from the application of subsection (a) with respect to any payment made before the date of the enactment of this Act.

The House Report contains the following explanation (H. Rep. No. 894, 83d Cong., 1st Sess., pp. 8-9 (1953-2 Cum. Bull. 508, 514)):

> Section 404(c) of the Revenue Act of 1942 (as amended by sec. 503(a) of the Revenue Act of 1950) provided in the case of decedents dying after the date of its enactment (October 21, 1942) that the proceeds of life insurance policies should not be included in the decedent's estate by reason of premiums paid by the decedent prior to January 10, 1941, if the decedent at no time after that date retained an incident of ownership in such policy. In determining whether the decedent had such an "incident of ownership" after January 10, 1941, there was to be taken into account only those reversionary interests exceeding 5 percent of the value of the policy and arising other than by operation of law. Your committee believes that similar treatment should be extended in the case of decedents dying after January 10, 1941, and before October 22, 1942. Such decedents will be deemed to have an incident of ownership in insurance policies by reason of a reversionary interest held after January 10, 1941, only if such reversionary interest exceeded 5 percent of the value of the policy and arose by the express terms of the policy or other instrument and not by operation of law.

The legislative history materials we have found do not indicate why it was considered unnecessary to extend the limitations period for filing claims for refund pursuant to the terms of this measure.

34. The Act of August 11, 1955, 69 Stat. 693, provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 223 of the Revenue Act of 1950 (relating to use of corporation property by a shareholder) is here-

> by amended by striking out "January 1, 1950" and inserting in lieu thereof "January 1, 1954".
>
> SEC. 2. No interest shall be allowed or paid on any overpayment resulting from the amendment made by the first section of this Act.

The House Report explains the amendment as follows (H. Rep. No. 1353, 84th Cong., 1st Sess., p. 1 (1955–2 Cum. Bull. 844):

> H.R. 2553 qualifies the application of section 502(f) of the Internal Revenue Code of 1939 to provide that personal holding company income is not to include rents received during taxable years ending after December 31, 1945, and before January 1, 1954, if the rents are for the use of property of a corporation where the lessee uses the property in the operation of a bona fide commercial, industrial, or mining enterprise. The same treatment was provided for the years 1946 through 1949 and somewhat similar treatment is provided for 1954 and subsequent years by the Internal Revenue Code of 1954.

See also S. Rep. No. 1242, 84th Cong., 1st Sess., p. 1 (1955–2 Cum. Bull. 845). In effect, this amendment made a retroactive change in the law for the years 1950–1953. Section 223 of the Revenue Act of 1950, 64 Stat. 906, 947, had made the same change retroactively for the years 1946 through 1949. The Act of February 11, 1958, (p. 137, *infra*), made the same change for taxable years ending in 1954 and governed by the 1939 Code. The legislative history materials we have found do not indicate why it was considered unnecessary to extend the limitations period for filing claims for refund pursuant to the terms of this Act.

35. The Act of January 28, 1956, 70 Stat. 8, provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 117(c)

(1)(A) of the Internal Revenue Code of 1939 is hereby amended by inserting after the word "reduced" the following: "(except for the purposes of determining the credits allowable under subsections (b), (h), and (i) of section 26)".

SEC. 2. The amendment made by section 1 shall be applicable with respect to taxable years beginning after December 31, 1951, and before January 1, 1954. No interest shall be allowed or paid on any overpayment resulting from such amendment.

The reasons for its enactment are stated in the following excerpt from the Report of the Ways and Means Committee (H. Rep. No. 1356, 84th Cong., 1st Sess., pp. 1-2 (1956-1 Cum. Bull. 961)):

The credit for intercorporate dividends received under the 1939 Code was 85 percent of the dividends but not to exceed 85 percent of the adjusted net income computed without regard to the deduction allowed for a net operating loss. Similarly, the credit allowed for dividends paid on certain preferred stock of public utilities was limited to a percentage of the amount of dividends paid, or to the percentage applied to the adjusted net income less the credits for dividends received. In the case of a Western Hemisphere trade corporation the credit was limited to a percentage of the normal tax net income. In all of these cases the question has arisen as to whether net income for purposes of computing the limitation with respect to the intercorporate dividends-received credit or the basis on which the other credits are computed, is to include capital gains. Capital gains under section 117 of the 1939 Code may (and under existing rates practically always are) subject to an alternative tax of 25 percent in lieu of inclusion in the base on which the regular corporate income tax is computed.

> Apparently prior to 1952 the Internal Revenue Service accepted the computation of these credits based upon net income including capital gains and even the recent rulings do not attempt to upset these computations. In the instructions accompanying the 1952 return from [*sic*] (and in 1953 a footnote was also added on the return) the Service indicated that it did not consider that net income for the purposes of computing these credits should properly include capital gains. It was not until 1954 in Revenue Ruling 54-28 that the position of the Internal Revenue Service on this matter was dealt with in a definitive ruling. Then this ruling was made applicable to 1952 and subsequent years. Your committee believes that the position in the ruling should be reversed for years prior to 1954 in order to provide a consistent policy for the period of 1939 Code. Under these circumstances and because you[r] committee believes that since capital gains may be included in the ordinary corporate tax base and are excluded only in arriving at an alternative, as distinct from a separate, tax the inclusion of such capital gains in income for purposes of computing these credits under the 1939 code appears entirely reasonable.

See also S. Rep. No. 1378, 84th Cong., 2d Sess., pp. 1-2 (1956-1 Cum. Bull. 982).

This bill was enacted on January 28, 1956. The first full year to which it applied was the calendar year 1952. Under Section 53 of the 1939 Code, corporations were required to file returns for the calendar year 1952 on March 15, 1953. Hence, under Section 322(b)(1) (App. A, *supra*) they had until March 15, 1956, or approximately forty-five days after enactment of this amendment within which to file claims for refund pursuant to its terms. However, corporations using fiscal years might have been barred

from claiming refunds pursuant to the terms of this Act on the date of its enactment.

The January 28, 1956 amendment, like the one involved in the instant case, which was enacted some five months later, was intended to overrule a construction of the statute espoused by the Commissioner but, subsequent to the enactment held to be erroneous by the Court of Claims (in *Pitcairn Co.* v. *United States,* 180 F. Supp. 582). Presumably, well-informed taxpayers in a position to benefit from the terms of the 1956 amendment had, like the taxpayer in *Pitcairn,* already taken steps to protect their rights when the amendment was enacted, and needed no extension of the limitations period for filing claims for refund.

36. Act of February 20, 1956, 70 Stat. 26, the statute involved in *Verckler* v. *United States,* 170 F. Supp. 802 (C. Cls.), provided, in part, as follows:

> SEC. 814. CREDIT FOR TAX ON CERTAIN PRIOR TRANSFERS
>
> (a) *General Rule.*—If the executor so elects, the tax imposed by sections 810 and 935 in the case of a decedent (but only if the decedent was a citizen or resident of the United States at the time of his death) dying after December 31, 1951, shall be credited with all or a part of the amount of the Federal estate tax paid with respect to the transfer of property (including property passing as a result of the exercise or nonexercise of a power of appointment) to the decedent by or from a person (herein designated as a 'transferor') who was the spouse of the decedent at the time of such person's death and who died with two years before the decedent's death. The credit shall be the amount determined under subsections (b) and (c).
>
> * * * * *

SEC. 2. No interest shall be allowed or paid on any overpayment resulting from the amendment made by the first section of this Act.

The bill (H.R. 7054) containing this provision was introduced on June 28, 1955, by Representative Baker of the Ways and Means Committee. Representative Reed, also of the Ways and Means Committee, gave the following explanation of its purpose (102 Cong. Record, Part 2, pp. 2440-41):

> H.R. 7054 is a bill sponsored by my distinguished colleague on the Committee on Ways and Means, the gentleman from Tennessee, Representative Baker. Very simply, it corrects a very severe hardship wherein a small estate has been subjected to two federal estate taxes within a period of less than 6 months. The Senate amendment simply increases the 6 month period contained in the House bill to 2 years * * *.

It thus appears that the Act of February 20, 1956, was introduced to provide relief for specific cases of hardship called to the attention of Congress.

It further appears that on the date of passage of this Act, February 20, 1956, neither that estate nor any estate which could benefit from its provisions was barred from claiming a refund by the provisions of Section 910 of the 1939 Code. Under Section 822 of the 1939 Code the estate tax was due 15 months after the date of death. The Act applied to estates of decedents dying after December 31, 1951. Hence, the earliest date on which an estate qualifying under this amendment would have paid its tax was April 1, 1953. Such an estate would have had until April 1, 1956, or 40 days after enactment to file a claim for refund. Yet in *Verckler*, the Court of Claims held that the

effect of the amendment was to set in motion a new three-year limitations period.

37. Section 3 of the Act of June 29, 1956, 70 Stat. 404, 405, provided, in substance, that in the case of distribution by a corporation to its stockholders of property having a fair market value in excess of corporate earnings and profits, the amount taxable as a dividend would in general be limited to the amount of the earnings and profits. Subsection (b), relating to the effective date of this amendment, provided as follows:

> (b) The amendment made by this section to section 115 of the Internal Revenue Code of 1939 shall be effective as if it were part of such section on the date of enactment of the Internal Revenue Code of 1939, except that it shall not apply to any taxable year of a shareholder which was a corporation and which filed a return for such year reporting dividends in accordance with publicly announced litigation policies of the Secretary or his delegate which had not been revoked at the time such return was filed. No interest shall be allowed or paid in respect of any overpayment of tax resulting from the amendment made by this section.

This measure is discussed in the Argument, *supra*, pp. 30–32.

38. The Act of February 11, 1958, P.L. 85–318, 72 Stat. 3, provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 812 (e)(1)(D) of the Internal Revenue Code of 1939 (relating to bequests of an interest to a surviving spouse conditional on survival for a

limited period) is amended by adding at the end thereof the following:

"For the purposes of subparagraph (B), an event or contingency shall not be considered an event or contingency upon the occurrence of which an interest passing to the surviving spouse will terminate or fail if—

"(iii) within six months after the date of the decedent's death, such event or contingency becomes impossible of occurrence; and

"(iv) the decedent was adjudged incompetent before April 2, 1948, and was not restored to competency before his death."

SEC. 2. The amendment made by this Act shall apply with respect to decedents dying after April 2, 1948.

SEC. 3. No interest shall be allowed or paid on any overpayment resulting from the amendment made by this Act.

The reasons for the enactment are stated in the following excerpt from the Senate Report (S. Rep. No. 1180, 85th Cong., 2d Sess., p. 2 (1958-1 Cum. Bull. 637-638):

The Revenue Act of 1948 provided a marital deduction as a part of a program of equalizing taxes between community property and noncommunity property States. In general, an individual is allowed a deduction in computing his estate tax for property going to a surviving spouse. This deduction is limited, however, to 50 percent of his gross estate.

Before the passage of the Revenue Act of 1948, it was quite common for wills to provide that a spouse must survive the administration of the decedent's estate in order to receive some specified property. Under the Revenue Act of 1948, however, the marital deduction was made available in these cases only where the property would go to the surviving spouse within 6 months after the death of the decedent

> and only then if the transfer actually occurred. As a result, many wills were changed after the passage of the 1948 act to provide that property was to pass to the surviving spouse within 6 months after the decedent's death rather than upon the completion of the administration of the decedent's estate.
>
> Cases have come to the attention of your committee, however, where individuals became mentally or otherwise incompetent before the passage of the 1948 act on April 2, 1948, and did not regain competency before their death. These individuals were not in a position to change their wills after the passage of the 1948 act and before their deaths. As a result their estates were denied the benefits of the marital deduction. Your committee believes that it is unfair to deny the benefits of the marital deduction in these cases where, although the instrument under which the property passed to the spouse did not require it, the property actually did pass to the surviving spouse within 6 months after the date of the decedent's death, the same period of time in which the property must pass to the surviving spouse under present law to qualify. In the absence of the incompetency on the part of the decedent, the provisions of the will would normally have been changed to qualify the estates for the marital deduction. Where there is this incompetency, your committee does not believe that it is desirable for the Government to impose a heavier estate tax than in the other situations.

This amendment is discussed in the argument, *supra*, pp. 22-23. As there noted, Senator Byrd, Chairman of the Senate Finance Committee, explained on the Senate floor that the bill was not intended to reopen otherwise barred years (104 Cong. Rec., pt. 1, p. 1049):

This bill will be applicable only in the case of individuals who, first, became incompetent before April 2, 1948, and did not regain competency before their deaths; second, who died between April 2, 1948, and August 16, 1954; and, third, whose estate tax returns are not closed to further assessment or refund as of the date of the enactment of this Act.

39. Act of February 11, 1958, P.L. 85-319, 72 Stat. 4:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 223 of the Revenue Act of 1950 (relating to use of corporation property by a shareholder) is amended by striking out "and before January 1, 1954," and inserting in lieu thereof "to which the Internal Revenue Code of 1939 applies,".

SEC. 2. No interest shall be allowed or paid on any overpayment resulting from the amendment made by the first section of this Act.

This amendment provided that for taxable years ending in 1954 and governed by the 1939 Code, rental income received by a corporation from a shareholder owning more than 25% of its stock would not be classified as personal holding company income if the property rented from the corporation was used in the operation of a bona fide commercial, industrial or mining enterprise. It was felt this type of rental income should not subject a corporation to the 75% or 85% penalty tax imposed on personal holding companies. Similar rules were in effect for 1939 Code years ending before 1954 and for years governed by the 1954 Code, but by an oversight Congress had failed to enact a similar rule for 1939 Code years ending in 1954. P.L. 85-319 was designed to correct this oversight. See H. Rep. No. 890, 85th Cong., 1st

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Sess.; S. Rep. No. 1181, 85th Cong., 2d Sess. (1958-1 Cum. Bull. 638).

It appears (103 Cong. Rec., pt. 10, p. 13171) that substantially the same bill was passed by the House in the previous session. The earlier bill, H.R. 11747, was introduced on June 13, 1956 (102 Cong. Rec., Part 8, p. 10293) at a time when no taxpayer to whom its substantive provisions applied would have been barred from claiming a refund by the limitations provisions of the Code. A taxpayer whose fiscal year ended on January 1, 1954, would have filed his return and paid his tax on or about March 16, 1954 (Internal Revenue Code of 1939, Section 53), and therefore, would have had until March 15, 1957, to file a claim for refund for that taxable year. H.R. 11747 was passed by the House on July 24, 1956 (102 Cong. Rec., Part 10, p. 14296), and referred to the Senate the same day (102 Cong. Rec., Part 10, p. 14228), but Congress adjourned three days later (102 Cong. Rec., Part 11), before the Senate had a chance to act on it. It is reasonable to assume that taxpayers affected by H.R. 11747 would have kept their fiscal years ending in 1954 open until P.L. 85-319 was passed in 1958.

In any event, it is quite clear Congress did not intend to extend the period for filing refund claims when it enacted P.L. 85-319. P.L. 85-319 was enacted the same day as P.L. 85-318 (App. 134), the similar retroactive relief amendment which Senator Byrd explicitly advised the Senate applied only to taxpayers "whose estate tax returns are not closed to further assessment or refund as of the date of the enactment of this act." (104 Cong. Rec., Pt. 1, p. 1049.) Since, immediately after making this statement, Senator Byrd turned to a discussion of P.L. 85-319, his comment was undoubtedly applicable to that provision as well.

40. Section 103 of the Technical Amendments Act of 1958, 72 Stat. 1606, 1675: Subsection (a) amended Section 131(e) of the 1939 Code (relating to the foreign tax credit) to provide, in substance, that the recipient of a patent or similar royalty from sources within the United Kingdom would be entitled to a foreign tax credit for the United Kingdom tax deducted from the royalty payments if the recipient elected to include the amount of such United Kingdom tax in his income. See H. Conference Rep. No. 2632, 85th Cong., 2d Sess., pp. 41–42 (1958–3 Cum. Bull. 1188, 1228–1229).

This amendment to the 1939 Code was made applicable to "all taxable years beginning on or after January 1, 1950, as to which Section 131 of the Internal Revenue Code of 1939 is the applicable provision." It also prohibited payment of interest on refunds made pursuant to its terms. Subsection (b) made substantially the same amendment to Section 905(b) of the 1954 Code.

Although the amendment made by subsection (a) of Section 103 is phrased in general terms (applying to "the recipient of a royalty or other amount") it was apparently enacted primarily, if not exclusively, for the benefit of the Westinghouse Electric Corporation. Section 103 was introduced as a floor amendment in the Senate on August 12, 1958, by Senator Martin of Pennsylvania. During discussion of the amendment that day, the following colloquy occurred (104 Cong. Record, Part 13, p. 17109):

> Mr. DOUGLAS. Mr. President, will the Senator yield for a question?
>
> Mr. MARTIN of Pennsylvania. I am glad to yield.
>
> Mr. DOUGLAS. Is that what is known as the Westinghouse amendment?

Mr. MARTIN of Pennsylvania. The Senator is correct.

Westinghouse Electric International Corporation (a wholly-owned subsidiary of Westinghouse Electric Corporation, a Pennsylvania corporation into which it merged on May 29, 1959) needed no extension of the period for filing claims for refund for the years 1950–1954 to benefit from the provisions of Section 103, as is shown by its petition in *Westinghouse Electric Corp* v. *United States*, C. Cls. No. 387–59.[8]

41. The Act of August 7, 1959, 73 Stat. 288, provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 2038 of the Internal Revenue Code of 1954 (relating to the treatment of certain revocable

[8] In this petition, plaintiff alleged (par. 7) that during the years 1950–1954 Westinghouse Electric International Corporation (WEICO) received royalties from several licensees located in the United Kingdom of Great Britain and Northern Ireland (the "U.K.") from which U.K. taxes had been withheld. Plaintiff further alleged (par. 8) WEICO reported the full amount of royalties, including tax withheld, as gross income during the years in suit (1950–1954) and claimed a foreign tax credit for the amount of U.K. tax withheld. This portion of WEICO's foreign tax credit was disallowed by the Service, and deficiencies were assessed, which were paid in 1955–1957. The petition further alleged (par. 9) that timely claims for refund were filed, which were disallowed on September 17, 1957 (for 1950–1952), October 30, 1957 (for 1953), and October 17, 1958 (for 1954). Therefore, Westinghouse was in a position to file a timely suit for refund, without any extension of the limitations period, when Section 103 of the Technical Amendments Act of 1958, *supra*, became law on September 2, 1958. Suit was instituted in the Court of Claims on or about September 15, 1959. The case was settled on the basis of Section 103, and stipulation for dismissal filed on March 28, 1961.

transfers for purposes of the estate tax) is amended by adding at the end thereof the following new subsection:

"(e) *Effect of Disability in Certain Cases.*—For purposes of this section, in the case of a decedent who was (for a continuous period beginning not less than 3 months before December 31, 1947, and ending with his death) under a mental disability to relinquish a power, the term 'power' shall not include a power the relinquishment of which on or after January 1, 1940, and on or before December 31, 1947, would, by reason of section 1000(e) of the Internal Revenue Code of 1939, be deemed not to be a transfer of property for purposes of chapter 4 of the Internal Revenue Code of 1939."

SEC. 2. The amendment made by the first section of this Act shall apply only with respect to estates of decedents dying after August 16, 1954. No interest shall be allowed or paid on any overpayment resulting from the application of the amendment made by the first section of this Act with respect to any payment made before the date of the enactment of this Act.

The committee reports described the bill in the following terms (H. Rep. No. 83, 86th Cong., 1st Sess., p. 1 (1959–2 Cum. Bull. 859, 860); S. Rep. No. 478, 86th Cong., 1st Sess., p. 1 (1959–2 Cum. Bull. 861)):

This bill adds a provision to the 1954 code relating to persons who have been mentally incompetent for a period beginning at least 3 months prior to December 31, 1947, and who remain so until the date of their death. The bill provides that any powers such persons have at the date of their death to change beneficiaries of a trust they created (of the type referred to in sec. 1000(e) of the 1939 code) are not to result in such property being included in their gross estate for estate tax purposes. This provision is the same as a 1939 code provision (sec.

811(d)(4)) which was applicable with respect to decedents dying after December 31, 1947, and on or before August 16, 1954.

This bill is reported unanimously by your committee.

42. Section 3 of the Act of August 7, 1953, 67 Stat. 471, provided:

SEC. 3. (a) That the third sentence of section 25(b)(3) of the Internal Revenue Code, relating to the definition of dependent, is amended to read as follows: "For the purposes of determining whether any of the foregoing relationships exist (1) a legally adopted child of a person or (2) a child for which petition for adoption was filed by a person in the appropriate court and denied because of mental incapacity of surviving natural parent to agree to such adoption, shall be considered a child of such person by blood."

(b) The provisions of subsection (a) shall be applicable to taxable years beginning after December 31, 1945.

The purpose and effect of this provision, added to the bill by the Senate, is explained by the following excerpt from the Senate Report (S. Rep. No. 610, 83d Cong., 1st Sess., p. 2):

Section 3 of the bill relates to a definition of a dependent for income-tax purposes. Under section 25(b)(3) of the Internal Revenue Code a child, in order to be claimed as a dependent by the person claiming the exemption, must be either legally adopted by such person or must be a child by blood of such person. In some cases it has developed that the person supporting a child has filed a petition for its adoption in the appropriate court but such petition has been denied because of the mental incapacity of the surviving natural parent to agree to the adoption. Your committee is of the opinion

that in such cases the person supporting the child who has filed a petition for adoption in the appropriate court should not be denied the right to claim the child as a dependent because of the mental incapacity of the surviving natural parent to agree to such adoption. Accordingly, this section treats such a child as a dependent of the person filing the petition for adoption if such person meets the required support test in section 25(a)(3) of the Internal Revenue Code.

43. Section 1 of the Act of August 9, 1955, 69 Stat. 625, provided:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 25(b)(3) of the Internal Revenue Code of 1939 (defining the term "dependent") is hereby amended by inserting after the fourth sentence thereof the following new sentence: "For taxable years beginning after December 31, 1946, the preceding sentence shall not exclude from the definition of 'dependent' any child of the taxpayer born to him, or legally adopted by him, in the Philippine Islands, if (i) the child is a resident of the Republic of the Philippines, and (ii) the taxpayer was a member of the Armed Forces of the United States at the time the child was born to him or legally adopted by him."

SEC. 2. Section 152(b)(3) of the Internal Revenue Code of 1954 (defining the term "dependent") is hereby amended by striking out "July 5, 1946" and inserting in lieu thereof "January 1, 1956".

SEC. 3. (a) The amendment made by the first section of this Act shall apply with respect to taxable years beginning after December 31, 1946, to which the Internal Revenue Code of 1939 applies.

(b) The amendment made by section 2 of this Act shall apply with respect to taxable years beginning after December 31, 1953, and ending after August 16, 1954.

The House Report gives the following explanation of this amendment (H. Rep. No. 1293, 84th Cong., 1st Sess., pp. 1–2 (1955–2 Cum. Bull. 888)):

Under section 25(b)(3) of the 1939 code no exemption for a dependent was allowed if the dependent was a citizen or subject of a foreign country unless he was a resident of the United States or a contiguous country. The 1954 code modified this restriction by providing in section 152(b) that any child of the taxpayer born to him, or legally adopted by him, in the Philippine Islands before July 5, 1946, may be claimed as a dependent if the child is a resident of the Republic of the Philippines, and if the taxpayer was a member of the Armed Forces of the United States at the time of the birth or adoption of the child.

This bill permits a taxpayer to claim as a dependent under the 1939 code any child born to him, or legally adopted by him, in the Philippine Islands if the child is a resident of the Philippines for the taxable year for which the deduction is claimed and the taxpayer was a member of the Armed Forces of the United States at the time of the birth or adoption of the child. This provision applies to all taxable years beginning after December 31, 1946, to which the Internal Revenue Code of 1939 applies. *However, the bill does not open up years with respect to which the statute of limitations has run.* [Emphasis supplied.]

The provision in the 1954 code relating to dependents who are residents of the Republic of the Philippines is also amended by permitting the taxpayer to claim as a dependent a child born to him or legally adopted by him prior to

> January 1, 1956, rather than July 5, 1946. This amendment applies with respect to taxable years beginning after December 31, 1953, and ending after August 16, 1954.
>
> This provision is designed primarily to be of aid to Filipinos who as members of the United States Armed Forces during World War II became citizens of the United States but whose families continue to reside in the Philippine Islands and have not become United States citizens.

The Senate Finance Committee adopted the House Report. S. Rep. No. 1148, 84th Cong., 1st Sess. (1955-2 Cum. Bull. 888-889). This Act, applicable to taxable years as far back as 1947, was silent with respect to the limitations question. Yet both the House Ways and Means Committee and Senate Finance Committees stated explicitly that it did not reopen barred years.

44. Section 1 of the Act of February 20, 1956, 70 Stat. 23:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) section 208(b) of the Technical Changes Act of 1953 is amended by striking out "1950" and inserting in lieu thereof "1947".
>
> (b) The amendment made by subsection (a) shall be effective as if enacted as a part of section 208(b) of the Technical Changes Act of 1953.

The purpose of this measure was as follows (H. Rep. No. 1605, 84th Cong., 1st Sess., p. 1 (1956-1 Cum. Bull. 919, 920)):

> This bill amends section 208(b) of the Technical Changes Act of 1953 by making that provision applicable to estates of decedents dying after December 31, 1947, instead of to estates

of decedents dying after December 31, 1950, as provided in the Technical Changes Act.

Section 208 of the Technical Changes Act of 1953 permitted for estate-tax purposes the tax-free release of certain powers over a discretionary trust described in section 1000(e) of the Internal Revenue Code of 1939, if the grantor was under a mental disability for a continuous period of not less than 3 months beginning before December 31, 1947, and ending with his death. The Technical Changes Act did not extend relief to a grantor under such a disability who died after December 31, 1947, and before January 1, 1951. This amendment would grant relief in such cases. The amendment is effective as if enacted as a part of section 208(b) of the Technical Changes Act of 1953.

It is estimated that the revenue effect of this provision is negligible.

This bill has been reported unanimously by your committee.

See also S. Rep. No. 1402, 84th Cong., 2d Sess., (1956-1 Cum. Bull. 950).

We know of at least one estate—that of Nellie B. Buckingham—which was interested in passage of this legislation and which had a timely suit pending on the date of its enactment. *Northern Trust Co. Exr. u/w of Nellie B. Buckingham, et al.* v. *United States*, Civil No. 52C1227 (N.D. Ill.). As the complaint (par. 4), filed on June 11, 1952, and answer (par. IV), filed on December 12, 1952, show, Nellie Buckingham died on October 23, 1948. She had created a trust on October 9, 1930, retaining the power to accelerate termination of the trust. (Compl. par. 8; Ans. par. VIII.) It was alleged decedent had been incompetent to release this power for a number of years prior to December 31, 1947, and that she did not regain competency prior to her death. In short,

the facts as alleged in the complaint fit precisely the provisions of Section 1 of the Act of February 20, 1956. On December 12, 1955, counsel for the estate wrote a letter to the Assistant United States Attorney in Chicago, tracing in detail the history of legislation which would govern the pending case, H.R. 6440, reported by the Senate Finance Committee in the 83d Congress, and H.R. 2667, passed by the House in the 84th Congress, and pending in the Senate when the letter was written. (H.R. 2667 was enacted as the Act of February 20, 1956, *supra.*) The letter requested a stay of proceedings pending passage of the legislation. The case was stayed pending passage of the amendment referred to, and after its passage was settled on the basis of that amendment.

45. Section 30 of the Revenue Act of 1962, 76 Stat. 960, 1069, provided:

> SEC. 30. EFFECTIVE DATE OF AMENDMENT TO SECTION 1374(b).
>
> The amendment made by Section 2(b) of Public Law 86–376 (73 Stat. 699) shall take effect on September 2, 1958.

This provision was offered on August 31, 1962, as a floor amendment by Senator Cotton of New Hampshire, who gave the following explanation (108 Cong. Record, No. 17, p. 17300):

> In the Technical Amendments Act of 1958 the Congress enacted subchapter S, relating to small business corporations. Under these provisions a qualified small business corporation can elect to have its income taxed directly to its shareholders and to have its net operating losses passed through directly to its shareholders. As initially enacted in 1958, section 1374 allowed a shareholder of an electing small business corporation to deduct his pro rata share of the corporation's net operating loss for his

taxable year in which or with which the taxable year of the corporation ends. However, a shareholder who dies before the end of the corporation's taxable year was deprived of his share of the net operating loss which occurred in the corporation's taxable year in which he died because there was no taxable year of the corporation that ended with or within the abbreviated taxable year of the shareholder. Because of this, section 1374 was amended by section 2(b) of Public Law 86–376, 86th Congress, 1st session, to make it clear that in such a case a deceased shareholder will not be denied his pro rata share of the electing small business corporation's net operating loss. This amendment, however, was made effective only from the day after the date of the enactment of Public Law 86–376. This was September 24, 1959.

The purpose of the proposed amendment is to make the effective date of this particular provision of Public Law 86–376, September 2, 1958, the date of the original enactment of subchapter S, in order that shareholders of an electing small business corporation who died prior to September 24, 1959, are also not denied their pro rata share of the net operating loss of the electing small business corporation occurring in the year of the shareholder's death.

See also H. Conference Rep. No. 2508, 87th Cong., 2d Sess., p. 48 (1962–3 Cum. Bull. 1129, 1176).

46. Section 5 of the Act of September 14, 1960, 74 Stat. 1017, 1019, provided that six specifically named union pension trusts, all of which the Internal Revenue Service had ruled were exempt from tax for certain years under Sections 401(a) and 501(a) of the 1954 Code, were also to be considered exempt for certain prior years (ranging from 1952 to 1958) if

they met certain conditions. For example, subsection (a) provided as follows:

> SEC. 5. (a) The Iron Workers, Mid-America Pension Fund, which was established by an indenture executed on January 30, 1957, as a result of an agreement between various locals affiliated with the International Association of Bridge, Structural, and Ornamental Iron Workers and three employer associations, and which has been held by the Internal Revenue Service to constitute a qualified trust under section 401(a) of the Internal Revenue Code of 1954, and to be exempt from taxation under section 501(a), of such Code, for years ending on or after December 17, 1958, shall be held and considered to have been a qualified trust under such section 401(a), and to have been exempt from taxation under such section 501(a), for the period beginning on January 30, 1957, and ending on December 16, 1958, but only if it is shown to the satisfaction of the Secretary of the Treasury or his delegate that the trust has not in this period been operated in a manner which would jeopardize the interests of its beneficiaries.

47. Sections 1 and 4 of the Act of June 27, 1961, 75 Stat. 120, contained essentially the same provisions as Section 5 of the Act of September 14, 1960 (App. 148). For example, Section 1 provided as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Plumbers Union Local Numbered 12 Pension Fund, which was established by a collective bargaining agreement effective September 1, 1954, and which has been held by the Internal Revenue Service to constitute a qualified trust under section 401(a) of the Internal Revenue Code of 1954, and to be exempt from taxation

under section 501(a) of said Code, for years ending on or after June 3, 1959, shall be held and considered to have been a qualified trust under said section 401(a), and to have been exempt from taxation under said section 501(a), for the period beginning on September 1, 1954, and ending on June 3, 1959, but only if it is shown to the satisfaction of the Secretary of the Treasury or his delegate that the trust has not in this period been operated in a manner which would jeopardise the interests of its beneficiaries.

U.S. GOVERNMENT PRINTING OFFICE

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v.

AARON ZACKS and FLORENCE ZACKS, *Respondents*

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENTS

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INDEX

CITATIONS

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BRIEF FOR RESPONDENTS

OPINION BELOW

The opinion of the Court of Claims (R. 11-14) is reported at 280 F. 2d 829.

JURISDICTION

The petition for certiorari was granted on January 14, 1963 (R. 31; 371 U.S. 961). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1255(1).

QUESTION PRESENTED

The question as stated in the petition for certiorari fairly presents the issue. The language used was as follows (p. 2):

> Whether a retroactive tax relief measure applicable to years otherwise barred by the statute of limitations must be deemed by implication to reopen the limitations period even though it does not expressly so provide.

In it recent brief the Government has restated the question by attempting to qualify the statute as a "clarifying or modifying" amendment. As will be shown herein, respondents do not believe this characterization is justified, and they question whether the recent restatement is not a change of substance in disregard of Rule 40.1(d)(2) of the Rules of this Court.

STATUTES INVOLVED

The pertinent statutes are § 117(q) of the Internal Revenue Code of 1939 as added by § 1 of the Act of June 29, 1956; § 322(b)(1) of the Internal Revenue Code of 1939; and § 7422(a) of the Internal Revenue Code of 1954. The relevant provisions of these statutes are set forth in the Appendix, *infra*, pp. 11-12.

STATEMENT

The respondent Florence Zacks is an inventor and at the time of trial was the holder of about fourteen patents (R. 23-26, 29). Substantially all of her income was derived from royalties paid to her for the use of her inventions (R. 1-2, 4-5, 17). The Court of Claims made no finding as to whether she was a professional or an amateur inventor (R. 11-14). The

brief for the Government has assumed that she was an amateur. Such an assumption is believed to be unwarranted. Under all of the decided cases and rulings in effect prior to 1956, she would have been considered to have been a professional inventor and to have been engaged in the business of selling her inventions.[1]

In 1952, Mrs. Zacks received royalties amounting to approximately $37,000 which she reported in her Federal income tax return as ordinary income (R. 2, 5, 17). This was in accordance with the then existing rulings of the Internal Revenue Service (R. 2, 5, 12). The statute of limitations on filing a claim for refund of taxes paid for 1952 expired on April 15, 1956 (R. 6; Govt. Br. 2).

After the expiration of the statutory period for filing a refund claim for 1952, Congress amended the 1939 Code expressly granting to professional inventors the right to accord long-term capital gain treatment to all qualifying transfers of patent rights, a right which, admittedly, they did not have prior to the amending legislation (R. 2, 5; Govt. Br. 10). The statute also set at rest the Court holdings to the effect that amateur inventors had a similar right, a right which the Commissioner of Internal Revenue had generally denied administratively prior to its enactment (R. 13; Govt. Br. 9-10). On June 23, 1958, within two years after said enactment, respondents filed the usual claim for refund asserting that under the provisions of § 117(q) they were entitled to report as long-term capital gains, rather than as ordinary income, the $37,000 royalties which they had received in 1952 (R. 2, 5-6).

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[1] This legal principle is discussed in connection with the argument, *infra*, pp. 5-6.

When the Commissioner of Internal Revenue failed to act on the claim for refund within six months (R. 3, 5), respondents brought suit in the Court of Claims (R. 1). They were met with the defense that their cause of action was barred because the claim for refund had not been filed within three years of the filing of the return or within two years of the payment of the tax (R. 6). In order to test this defense, the respondents filed a motion to strike it (R. 8) which was granted by the Court of Claims (R. 11-14).

Following a trial on the merits (R. 19), the parties agreed upon a judgment for the taxpayers in the amount of $4,624.09, reserving to the United States the right to seek a review of the holding on the statute of limitations question (R. 17-18).

SUMMARY OF ARGUMENT

The petitioner misconstrued the effect of the 1956 amendment in contending that it merely put "to rest a live controversy" (Govt. Br. 7). Insofar as professional inventors were concerned, no live controversy was extant, and they had no valid basis for filing a claim for refund until the 1956 amendment.

At the time § 117(q) was enacted, the normal statute of limitations had already expired as to 1952. In this posture of the case, the Act of Congress was an "idle gesture," as the Court below suggested, if the creation of new rights by the 1956 statute was already nullified by the previous passage of time.

The action or lack of action with regard to the statute of limitations taken by Congress in 47 dissimilar enactments, in no way indicates Congressional intent as to § 117(q). It is agreed that in making the 1956

retroactive change effective for 1952, Congress intended that the professional inventors would derive some new benefit from the legislation (Govt. Br. 45).

In the event that resort is had to rules of statutory construction, then § 117(q) should be held to start anew the running of the statute of limitations in order to give effect to both statutes, to permit a special and later statute to prevail over a general and earlier one, and to give a relief statute the liberal construction to which it is entitled.

ARGUMENT

I. Insofar as Mrs. Zacks is Concerned, the 1956 Legislation Specifically Created New Rights

The Government begins its brief by pointing out in some detail the vacillating administrative treatment given to amateur inventors prior to the legislation here involved (Govt. Br. 9-11; cf. R. 12-13). The Government fails to point out that the "conflict" between the courts and the Commissioner was confined to royalties paid to amateur inventors. The amending statute, it should be emphasized, did much more than rectify the inconsistent administrative positions. As the Government admits (Br. 10-11, fns. 2, 3, Br. 45), the statute changed the law in two respects: (1) it gave professional inventors, for the first time, the right to treat qualifying patent royalties as long-term capital gain; and (2) it allowed all inventors to treat their qualifying patent royalties as long-term capital gain even though the property had not been held for the customary six months.

The Government presents its case, however, on the theory that the 1956 amendment was designed to "put at rest" litigation that was already pending; and it

was clearly in this context that the Fifth and Sixth Circuits decided the *Tobin* and *Dempster* cases cited by the Government (Govt. Br. 12, fn. 5 and Br. 41 and 44).

The taxpayers submit that this theory cannot be stretched to cover their case where it seems readily apparent that prior to 1956, they had no justifiable cause of action. Most of the pre-1956 cases turn solely on the question of whether the particular taxpayer was or was not a professional inventor. If the taxpayer owned more than four patents, he was generally held to be in the business of inventing,[3] and respondents have found no case in which anyone with as many as fourteen patents was held to be an amateur.

It accordingly follows that Mrs. Zacks as a professional inventor did not sleep on any rights which were available to her prior to 1956. Before § 117(q) was enacted, she had no right to capital gain treatment of her royalties. It was the enactment of that section of the Code which, for the first time, gave her that right. Respondents filed the necessary claim for refund within two years of the enactment of the new legislation (R. 2, 5-6). The Court of Claims was accordingly correct in holding that the creation of new substantive rights should not be construed to be an "idle gesture" when to do so would attribute to Congress the concurrent granting and denial of a right by legislation which was admittedly remedial.

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[3] In *Lorenz* v. *United States*, 296 F. 2d 746, 749 (Ct. Cl., 1961), it was admitted that the taxpayer was a professional inventor (Cf. Govt. Br. 44, fn. 30). The cases and articles are collected at 3B Mertens, Law of Federal Income Taxation, § 22.133, and particularly at footnotes 90, 91, and 97, and at Gitlin and Woodward, "Tax Aspects of Patents, Copyrights & Trademarks," Practising Law Institute, 1960.

II. The Action of Congress in 47 Dissimilar Statutes Does Not Create Any Pattern Which Is Helpful in the Instant Proceeding

On pages 15 to 32 of its brief, the Government has set forth a number of instances in which the Congress has seen fit to change existing legislation and either shorten or enlarge periods for filing claims or, in other instances as in the case at bar, has been silent.

As a matter of statutory construction, legislation should be construed so as to have both purpose and effect. The role of statutory construction is not to create doubts. As was said in *United States* v. *Rice*, 327 U.S. 742, 752-753 (1946):

> Statutory language and objective, thus appearing with reasonable clarity, are not to be overcome by resort to a mechanical rule of construction, whose function is not to create doubts but to resolve them when the real issue or statutory purpose is otherwise obscure.

The rule to be followed here was enunciated in *United States* v. *Borden Co.,* 308 U.S. 188, 198 (1939), as follows:

> It is a cardinal principle of construction that repeals by implication are not favored. *When there are two acts upon the same subject, the rule is to give effect to both if possible.* (Italics supplied.)

The holding of the Court of Claims in the case at bar observes this rule by giving effect to § 117(q) when claims have been filed after its enactment and within the general limitations period following the enactment. The Third Circuit, while denying relief in *Smith* v. *United States,* 304 F. 2d 267, certiorari pending (No.

14, 1963 Term), tacitly implies that had the claim been filed within two years after enactment it would have been timely (Govt. Br. 13, fn. 10).

What action should be taken by this Court in connection with various other statutes is a proper subject for decision when those cases and their particular facts are presented to the Court.

III. The Statutes of Limitation Should Not Be Construed to Bar the Present Cause of Action Under Well Established Rules of Statutory Construction

The fundamental purpose of the statute of limitations is to put at rest stale controversies where one of the parties has slept on his rights. This basic purpose is certainly not accomplished where the taxpayer had no rights until Congress changed the law so as to give these rights.

If general statutory construction rules should be considered, then the following holdings are applicable. First, statutes are to be construed so as to give effect to all of them where it is practical to do so.[3] The holding below accomplishes this result by treating § 117(q) as creating a new cause of action to which the limitations period begins anew to run. Second, § 117(q) is clearly a remedial provision and should be liberally construed so as to give the relief it was intended to provide.[4] Third, § 117(q) being specific legislation,

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[3] *United States* v. *Menasche*, 348 U. S. 528, 538-539 (1955); *Markham* v. *Cabell*, 326 U. S. 404, 411 (1945).

[4] *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 263 (1931); *Wing* v. *Commissioner*, 8 Cir., 278 F. 2d 656, 661 (1960; considering § 117(q)); *Bannister* v. *United States*, 5 Cir., 262 F. 2d 175, 178 (1958); United States Constitution, Article I, Section 8, Clause 8.

must prevail over the general legislation.[5] Fourth, the 1956 subsequent legislation should prevail over the earlier statutes.[6] Fifth, the statute of limitations should not be applied where one party has induced another to forego procedures which would avoid the bar of the statute.[7]

Thus in equity and good conscience the nation's tax collector should not be permitted to tell taxpayers formally that they must report patent royalties as ordinary income (R. 13) and then defend actions such as this on the premise that the taxpayers should not have believed him. Such a position, if allowed, necessarily will breed litigation because taxpayers are being told that they must follow administrative holdings at their own risk and jeopardy. For years the Government has been endeavoring to build up the effectiveness and validity of administrative rulings. It is surprising that in this case it is now suggesting that taxpayers should follow such rulings only at their peril and that to save themselves from the statute of limitations they should file claims or lawsuits regardless of the chances of success.

While petitioner suggests that it is perplexed over the proper statute of limitations to apply (Govt. Br. 40), such a problem is not a part of this case. If the enactment is considered to be effective after the statute

[5] *Missouri* v. *Ross*, 299 U. S. 72, 76 (1936); *Haskins & Sells* v. *United States*, 91 Ct. Cl. 35, 40 (1940); 2 Sutherland, Statutory Construction (2d ed., 1943), § 5204.

[6] *Oates* v. *First National Bank*, 100 U. S. 239, 244 (1879); 2 Sutherland, *op. cit.*, § 5201 at fn. 8; and 12 ALR 2d 430.

[7] The classic example in this field is the payment of interest on a note which the courts have generally held begins anew the running of the statute. 54 C.J.S. Limitations of Actions § 323.

of limitations has run, then it seems apparent that the enactment has created "a constructive payment" or overpayment of the tax as of the date the Act was approved. The general limitations and claims for refund provisions would thereafter be applied to this constructive payment date.[8]

CONCLUSION

The taxpayers prior to 1956 had no right to treat their patent royalties as long-term capital gain. They were given this right by Congress in § 117(q) and it should be recognized by the Courts where, as here, taxpayers have acted within two years of the new enactment. The judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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[8] This has been the holding of the Court below (Govt. Br. 12-13). Cf. *Smith* v. *United States*, 3 Cir., 304 F. 2d 267, 269 (1962), certiorari pending (No. 14, 1963 Term). In opposing certiorari in the *Smith* case the Government indicated that the correct period of limitations to be applied "is not a matter of basic principle warranting review by this Court in the absence of a conflict." (Govt.'s Br. in *Smith* v. *United States*, *supra*, page 8).

APPENDIX

INTERNAL REVENUE CODE OF 1939:

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * * *

(q) [as added by Sec. 1 of the Act of June 29, 1956, c. 464, 70 Stat. 404]. TRANSFER OF PATENT RIGHTS.—

(1) GENERAL RULE.—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are—

(A) payable periodically over a period generally coterminous with the transferee's use of the patent, or

(B) contingent on the productivity, use, or disposition of the property transferred.

* * * * *

(4) APPLICABILITY.—This subsection shall apply with respect to any amount received, or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred.

(26 U.S.C., Supp. V, Appendix, 117.)

* * * * *

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) LIMITATION ON ALLOWANCE—

(1) PERIOD OF LIMITATION.—Unless a claim for credit or refund is filed by the taxpayer within three years

from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(26 U.S.C. 1952 ed., Sec. 322.)

INTERNAL REVENUE CODE OF 1954:

SEC. 7422 CIVIL ACTIONS FOR REFUND.

(a) NO SUIT PRIOR TO FILING CLAIM FOR REFUND.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * * *

(26 U.S.C. 1958 ed., Sec. 7422.)

No. 44

IN THE

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OCTOBER TERM, 1963

UNITED STATES OF AMERICA, *Petitioner*

v.

AARON ZACKS and FLORENCE ZACKS

On Writ of Certiorari to the United States Court of Claims

MOTION OF THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND PROPOSED BRIEF AMICUS CURIAE

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Pursuant to Rule 42(3) of this Court's Rules, the abovenamed movant (known to the public and sometimes referred to herein as the "Nickel Plate Road") seeks leave of this Court to file a brief as *amicus curiae* in the instant case. The proposed brief, in printed form, is annexed to each of the forty copies of this motion filed herein.

As detailed below, movant's interests will be directly and substantially affected by the disposition of the instant case; and unless this Court receives and considers movant's proposed brief as *amicus curiae*, a question of law

will not be adequately presented by the parties although it is encompassed in the issue this Court is asked to decide in the instant case.

1. Nickel Plate is plaintiff in a case now pending in the Court of Claims (Docket No. 385-61) which involves Section 94 of The Technical Amendments Act of 1958.* Section 94 was enacted to afford various forms of retroactive tax relief to railroads (such as the Nickel Plate Road) which, in the early 1940's, had been compelled to change from retirement to straight line depreciation accounting. Section 94(f) created a retroactive right to refund of excess profits taxes by authorizing recomputation of equity invested capital, for each and every prior taxable year, beginning with the year of change in accounting method. Nickel Plate changed its accounting method in 1943, and it is undisputed that recomputation under Section 94(f) of its equity invested capital for 1943 and 1944 entitles it to a refund of 1943-1944 excess profits taxes exceeding $1,500,000, if its claims for refund were timely filed. The Government contends, however, that when Section 94 was enacted, it was already too late for Nickel Plate to file claims thereunder for 1943 and 1944, because the general period of limitations had long since expired.

2. In short, the Government seeks to engraft upon the retroactive relief created by Section 94(f) a qualification—nowhere to be found in the statutory language, and nowhere alluded to in the underlying Congressional hearings or committee reports—that a taxpayer's right to the relief authorized is limited to taxable years which are still open under general periods of limitation.

3. In the instant proceedings, this Court has undertaken to review the Court of Claims' decision in *Zacks* v. *United States*, 280 F. 2d 829. There, as in Nickel Plate's pending case in the Court of Claims, the Government contended that a right to retroactive relief created by statute (Sec-

* Public Law 85-866, 72 Stat. 1606. Section 94 is known as the Retirement-Straight Line Adjustment Act of 1958.

tion 117(q) of the Internal Revenue Code of 1939) was curtailed by general periods of limitation, even though Congress did not see fit to qualify the enabling terms of the statute in that fashion. This construction of Section 117(q) was rejected, and the Government now contends that the Court of Claims erred in so doing.

4. But the Government seeks a far broader ruling here; it seeks the promulgation by this Court of a new and far-reaching principle of statutory construction. Under the proposed principle, Congress would be conclusively presumed to intend that all forms of retroactive relief created by statute shall be limited to years still open under general periods of limitation, unless such a qualification is expressly negated by the terms of the statute. The Government asks this Court to espouse such a sweeping principle of law—which would curtail or extinguish altogether the substantive rights of countless taxpayers to retroactive relief created by statute—without regard to the particular language and legislative history of particular statutory provisions. Yet surely Congress may extend retroactive relief to years closed by general periods of limitation in a variety of ways, and by various forms of expression. And if the intention of Congress to accomplish such a result emerges from the language and legislative history of a particular statutory provision, surely such intent should not be overridden by a conclusive presumption of law founded upon silence, upon the failure of Congress to refer *eo nomine* to general periods of limitation.

5. If, in deciding the instant case, this Court were to adopt the rigid rule of statutory construction advanced by the Government, such a decision would automatically require the Court of Claims to decide Nickel Plate's pending case in favor of the Government. Such a result would necessarily follow, without regard to the differences between Section 117(q) and Section 94 in objectives, statutory language and legislative history, by reason of the single fact that Section 94 does not refer expressly to general periods of limitation.

6. The fate of Nickel Plate and other Section 94 claimants is of great importance not only to themselves but to the Federal revenues; indeed, it would appear from the Government's own Petition for a Writ of Certiorari herein that the construction of Section 94 is the primary object of concern to the taxing authorities. In attempting to demonstrate the importance of the question presented, the Government admits that there are only a "relatively few pending cases" under Section 117(q) itself—and then hurries on to single out Section 94 (referred to as the Retirement-Straight Line Adjustment Act of 1958) as the really important battleground, where "the otherwise barred claims of three taxpayers alone involve an aggregate of over nineteen million dollars * * *." (Pet. 15-16.)

7. Although the construction of Section 94 is encompassed in the issue which this Court is asked to decide, and although it appears that such construction is of primary importance to the Federal revenues, it is evident that this issue will not be adequately presented by petitioner, or respondent. Section 94 looms large in the Government's Petition for a Writ of Certiorari, but it is given short shrift in the Government's brief on the merits. In 45 pages of text, the Government makes but one passing reference (Br. 20) to Section 94. The terms of the provision and a passage from an underlying Congressional committee report are buried in a lengthy appendix (Br. 119-121). As for the forthcoming taxpayer's brief on the merits, it cannot and should not be expected that this brief will be devoted in any substantial part to Section 94; the task of taxpayer's counsel is to defend the Court of Claims' construction of Section 117(q). Hence, unless Nickel Plate is allowed to file its proposed brief *amicus curiae,* which is devoted to a thorough presentation of legal considerations pertinent to the retroactive reach of Section 94, this Court will receive little or no enlightenment on this subject.

8. No questions of fact are raised or discussed by the proposed brief *amicus curiae;* the construction of Section 94 is presented solely as an issue of law, in the context of

facts which have been formally stipulated or otherwise agreed upon. More particularly, Nickel Plate seeks to demonstrate, as a matter of law, that the clear language of Section 94 admits of but one construction with respect to the authorized retroactive recomputation of equity invested capital; and that there is nothing in the underlying Congressional committee reports or hearings to suggest some other construction or to import a latent ambiguity. This was and is Nickel Plate's position in the Court of Claims, and if it is correct, there is no need, of course, to reach questions of fact.

9. The retroactive reach of Section 94(f) is a matter of great moment to many railroads as well as to the Federal revenues, given the very large sums involved. For that reason, and because, in Nickel Plate's view, analysis of the Section 94 issue sheds a strong light on the fallacies inhering in the Government's position herein, we submit that Section 94 should receive this Court's particular scrutiny.

WHEREFORE, upon all of the foregoing grounds, movant requests leave of this Court to file its proposed brief as *amicus curiae* annexed hereto.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The motion for leave to file this brief sets forth in some detail the interest herein of this *amicus curiae* (known to the public and hereafter sometimes referred to as "the Nickel Plate Road"). Briefly, if this Court were to promulgate the far-reaching rule of statutory construction for which the Government contends, it would automatically require a decision against Nickel Plate as plaintiff in a pending case in the Court of Claims which involves the scope of retroactive relief legislation, *i.e.*, Section 94 of The Technical Amendments Act of 1958.[1]

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[1] Public Law 85-866, 72 Stat. 1606. Section 94 is known as the Retirement Straight Line Adjustment Act of 1958.

THE QUESTION PRESENTED BY PETITIONER AND ITS RELATION TO SECTION 94

In substance, the broad issue raised by the Government as petitioner is whether, when Congress enacts retroactive tax relief legislation, the omission of specific reference to periods of limitation should, without more, give rise to a conclusive presumption that retroactivity is limited to years not barred by general periods of limitation.

The retroactive tax relief statute with which this brief is concerned, Section 94 of The Technical Amendments Act of 1958, *supra*, does not make any specific provision with respect to general periods of limitation. The question presented and discussed herein is whether the conclusive presumption for which the Government contends would, or would not, operate to override the clear intent of Congress, if applied to Section 94.

Testing the Government's general thesis in particular relation to Section 94 is warranted by the importance to the Federal revenues of Section 94 claims—an importance singled out for emphasis by the Government in its Petition for a Writ of Certiorari (p. 16)—and by the critical impact which this Court's adoption of the Government's contention would have upon many railroads with Section 94 claims. Moreover, the extreme consequences which could and would flow from this Court's promulgation of the proposed conclusive presumption are illustrated in clear-cut fashion by its application to Section 94, as will appear.

STATUTE INVOLVED

Public Law 85-866, cited as The Technical Amendments Act of 1958:

Sec. 94. Change from Retirement to Straight Line Method of Computing Depreciation in Certain Cases.

(a) Short Title.—This section may be cited as the "Retirement-Straight Line Adjustment Act of 1958".

(b) MAKING OF ELECTION.—Any taxpayer who held retirement-straight line property on his 1956 adjustment date may elect to have this section apply. Such an election shall be made at such time and in such manner as the Secretary shall prescribe. Any election under this section shall be irrevocable and shall apply to all retirement-straight line property as hereinafter provided in this section (including such property for periods when held by predecessors of the taxpayer).

(c) RETIREMENT-STRAIGHT LINE PROPERTY DEFINED.—For purposes of this section, the term "retirement-straight line property" means any property of a kind or class with respect to which the taxpayer or a predecessor (under the terms and conditions prescribed for him by the Commissioner) for any taxable year beginning after December 31, 1940, and before January 1, 1956, changed from the retirement to the straight line method of computing the allowance of deductions for depreciation.

(d) BASIS ADJUSTMENTS AS OF 1956 ADJUSTMENT DATE.—If the taxpayer has made an election under this section, then in determining the adjusted basis on his 1956 adjustment date of all retirement-straight line property held by the taxpayer, in lieu of the adjustments for depreciation provided in section 1016 (a) (2) and (3) of the Internal Revenue Code of 1954, the following adjustments shall be made (effective as of his 1956 adjustment date) in respect of all periods before the 1956 adjustment date:

(1) DEPRECIATION SUSTAINED BEFORE MARCH 1, 1913.—For depreciation sustained before March 1, 1913, on retirement-straight line property held by the taxpayer or a predecessor on such date for which cost was or is claimed as basis and which either—

(A) RETIRED BEFORE CHANGEOVER.—Was retired by the taxpayer or a predecessor before the changeover date, but only if (i) a deduction was allowed in computing net income by reason of such retirement, and (ii) such deduction was computed on the basis of cost without adjustment for depreciation sustained before March 1, 1913. In the case of any

such property retired during any taxable year beginning after December 31, 1929, the adjustment under this subparagraph shall not exceed that portion of the amount attributable to depreciation sustained before March 1, 1913, which resulted (by reason of the deduction so allowed) in a reduction in taxes under the Internal Revenue Code of 1954 or prior income, war-profits, or excess-profits tax laws.

(B) HELD ON CHANGEOVER DATE.—Was held by the taxpayer or a predecessor on the changeover date. This subparagraph shall not apply to property to which paragraph (2) applies.

The adjustment determined under this paragraph shall be allocated (in the manner prescribed by the Secretary) among all retirement-straight line property held by the taxpayer on his 1956 adjustment date.

(2) PROPERTY DISPOSED OF AFTER CHANGEOVER AND BEFORE 1956 ADJUSTMENT DATE.—For that portion of the reserve prescribed by the Commissioner in connection with the changeover which was applicable to property—

(A) sold, or

(B) with respect to which a deduction was allowed for Federal income tax purposes by reason of casualty or "abnormal" retirement in the nature of special obsolescence,

if such sale occurred in, or such deduction was allowed for, a period on or after the changeover date and before the taxpayer's 1956 adjustment date.

(3) DEPRECIATION ALLOWABLE FROM CHANGEOVER TO 1956 ADJUSTMENT DATE.—For depreciation allowable, under the terms and conditions prescribed by the Commissioner in connection with the changeover, for all periods on and after the changeover date and before the taxpayer's 1956 adjustment date.

This subsection shall apply only with respect to taxable years beginning after December 31, 1955.

(e) EFFECT ON PERIOD FROM CHANGEOVER TO 1956 ADJUSTMENT DATE.—If the taxpayer has made an election under this section, then in determining

the adjusted basis of any retirement-straight line property as of any time on or after the changeover date and before the taxpayer's 1956 adjustment date, in lieu of the adjustments for depreciation provided in section 1016 (a) (2) and (3) of the Internal Revenue Code of 1954 and the corresponding provisions of prior revenue laws, the following adjustments shall be made:

(1) FOR PRESCRIBED RESERVE.—For the amount of the reserve prescribed by the Commissioner in connection with the changeover.

(2) FOR ALLOWABLE DEPRECIATION.—For the depreciation allowable under the terms and conditions prescribed by the Commissioner in connection with the changeover.

This subsection shall not apply in determining adjusted basis for purposes of section 437 (c) of the Internal Revenue Code of 1939. This subsection shall apply only with respect to taxable years beginning on or after the changeover date and before the taxpayer's 1956 adjustment date.

(f) EQUITY INVESTED CAPITAL, ETC.—If an election is made under this section, then (notwithstanding the terms and conditions prescribed by the Commissioner in connection with the changeover)—

(1) EQUITY INVESTED CAPITAL.—In determining equity invested capital under section 458 and 718 of the Internal Revenue Code of 1939, accumulated earnings and profits as of the changeover date, and as of the beginning of each taxable year thereafter, shall be reduced by the depreciation sustained before March 1, 1913, as computed under subsection (d) (1) (B); * * *

ARGUMENT

THE RETROACTIVE REACH OF SECTION 94 (f) IS CLEARLY INDEPENDENT OF GENERAL PERIODS OF LIMITATION, AND ANY INFERENCE OR PRESUMPTION TO THE CONTRARY WOULD BE ERRONEOUS, AS A MATTER OF LAW

I. The Problem Which Section 94 Was Enacted to Resolve

The object of this brief is to demonstrate that, as a matter of law, the retroactive scope of Section 94(f) is independent of general periods of limitation; indeed, that the tax relief afforded by that provision necessarily reaches far back into years otherwise closed to the great majority of railroads entitled to such relief.

At the outset, however, it is necessary to acquaint this Court in brief compass with the origins and development of the problem with which Congress dealt in enacting Section 94. The account given below summarizes undisputed facts drawn in great part from two short documents, printed herein as Appendix A and Appendix B, respectively: (1) An introductory passage in the Senate Report underlying Section 94 as enacted; and (2) The stipulation of facts in Nickel Plate's pending Court of Claims case, Docket No. 385-61.

Prior to 1942, class I railroads (including Nickel Plate) had for many years employed the retirement method of accounting with respect to certain roadway properties, both in reporting to the Interstate Commerce Commission (hereinafter referred to as "the ICC") and in computing depreciation for income tax purposes. Under the retirement method, depreciation is not taken year by year; instead, the original cost of an asset (less salvage value) is charged off against income for the year in which the asset is retired from use. In 1942, the ICC ordered all class I railroads to change, not later than January 1, 1943, from the retirement method to the straight-line method of accounting, whereunder the roadway properties involved would be written off by annual depreciation deductions geared to the useful lives of the properties.

Most of the railroads affected by the ICC order (including Nickel Plate) felt compelled to change their accounting for Federal income tax purposes to conform with the new ICC accounting, and therefore sought the consent of the Commissioner of Internal Revenue (as required by the tax laws) to make such a change. Permission was granted by the Commissioner, but only on the condition that the railroads making the change agree to establish an arbitrary reserve of 30 per cent, to reflect what the Commissioner deemed to be past-accrued depreciation on the roadway properties involved.

The Commissioner granted his conditional consent in virtually identical "terms letters" addressed severally to the applicant railroads, and these railroads were required to agree in writing to abide by all provisions of the terms letters. One major requirement of the terms letters was that the arbitrary 30 per cent reserve should, in effect, be subtracted from the remaining amount of basis which could be recovered through depreciation. A second major requirement of the terms letters was that accumulated earnings and profits, as of the effective date of changeover in tax accounting method, be reduced by the 30 per cent reserve. The resulting adjustment of equity invested capital, as computed under the World War II and Korean War excess profits tax laws, served to reduce the excess profits credit and increase the excess profits tax liability of the railroads making the changeover.

The applicant railroads (including Nickel Plate) protested that the conditions imposed by the terms letters were onerous and inequitable, but many of them (including Nickel Plate) finally agreed in writing to abide by such conditions, as the price of employing the same accounting method both for ICC reports and income tax returns. The resultant changeovers in accounting method took place, generally, during 1942 and 1943. Nickel Plate's changeover, under its terms letter and its consent thereto, was effective January 1, 1943.

Thereafter, a few of the railroads involved refused to abide by the conditions of the terms letters, challenging them in the courts; and such action operated, of course, to extend the general period of limitations for recovery of refunds by the litigating roads. However, the other railroads (including Nickel Plate) honored their commitments to the Commissioner, pending relief legislation. Thus, beginning with the year of changeover, Nickel Plate and many other roads developed their accumulated earnings and profits, computed their equity invested capital and paid their excess profits taxes in accordance with the conditions of the terms letters. For such roads, of course, the general period of limitations for filing claims for refund, as prescribed by Section 322 of the 1939 Internal Revenue Code and Section 6511 of the 1954 Internal Revenue Code, had long since expired with respect to many taxable years after the changover, when Section 94 was enacted in 1958.

As recited in the excerpt from the Senate committee report underlying Section 94 (Appendix A, *infra*), litigation involving the terms letters had cast some doubt on the validity of the 30 per cent reserve requirements; and the basic purpose of Section 94 was to resolve the continuing controversy over such requirements between the railroads and the Internal Revenue Service.

Within two years after the enactment of Section 94, the roads which had abided by the terms letters until they were abrogated by the new legislation (including Nickel Plate) filed claims for refund of excess profits taxes for years beginning with the year of changeover. The Commissioner, however, disallowed such claims as to all early years on the ground that they were barred by expiration of the general period of limitations. Nickel Plate's pending case in the Court of Claims involves the Commissioner's determination that its claims for refund of excess profits taxes for 1943 and 1944 were not timely filed because the general period of limitations for those years had expired—long before Section 94 was enacted.

II. The Statute and the Underlying Congressional Committee Reports and Hearings

Section 94 of the Technical Amendments Act of 1958, *supra*, abrogated the arbitrary and onerous 30 per cent reserve requirements of the terms letters and authorized the substitution of a much lower reserve for tax accounting purposes. There is a significant dichotomy, however, in the provisions for retroactivity of the tax relief thus enacted.

In authorizing the substitution of the new, lower reserve, Congress afforded relief to the railroads in the form of major increases in depreciation allowances. But Congress manifested its concern with the impact of such increases on the revenues by expressly providing that, with respect to depreciation allowances, the substituted reserve could be utilized only for years beginning on or after January 1, 1956. In other words, only a very limited retroactivity was permitted by Section 94 in this regard.

However, for the purpose of excess profits tax relief, Congress did not choose to limit retroactivity in the same fashion. To the contrary, in Section 94(f)(1), *supra*, Congress expressly and unqualifiedly authorized the utilization of the new reserve in the recomputation of accumulated earnings and profits, and thence of the equity invested capital—

> as of the changeover date [January 1, 1943 for Nickel Plate and in the early 1940's for other roads], *and as of the beginning of each taxable year thereafter* * * *. [Emphasis supplied].

We submit that Section 94(f)(1) could scarcely be more explicit or precise in defining the retroactive scope of the relief afforded with respect to excess profits taxes. Retroactive recomputations are categorically authorized, not only as of the railroads' changeover dates in the early 1940's, but as of the beginning of each and every taxable year thereafter. Surely Congress did not intend to authorize such retroactive annual recomputations as a mere

academic exercise; it must have intended such retroactive adjustments to have practical tax consequences, i.e., the redetermination and refund, in part or in whole, of World War II and Korean War excess profits taxes. Nor does the unqualified language of the statute suggest or permit a discriminatory construction which would allow the authorized retroactive relief only to the few railroads which had litigated the terms letters at an early date, and deny the same relief to the many roads which had honored their commitment to abide by the terms letters. Yet such a discrimination is imputed to Congress by the Government's contention that, *sub silentio*, Congress intended Section 94(f)(1) to apply retroactively only to years not otherwise barred by general periods of limitation.

That Congress meant exactly what it said in Section 94(f)(1), without any silent reservations, is confirmed by the intention expressed in the underlying Senate Finance Committee Report to eliminate completely the inequitable duplication under the terms letters of earlier adjustments of equity invested capital. Thus, the Committee declared forthrightly that (S. Rep. No. 1983, 85th Cong., 2d Sess. pp. 247-248 (1958-3 Cum. Bull. 1168-1169)):

> These adjustments in accumulated earnings and profits are to be made notwithstanding the terms and conditions prescribed by the Commissioner of Internal Revenue in connection with the changeover to the straight line method of computing depreciation.
>
> * * *
>
> Any further reduction of accumulated earnings and profits under section 458 and section 718 of the 1939 Code to reflect such depreciation would constitute *a double adjustment in the computation of the taxpayer's equity invested capital.* [Emphasis supplied.]

As against the affirmative intent evidenced by the above-quoted declarations voiced by the Senate Finance Committee, there is not one passage, one sentence, one phrase, within the four corners of either Congressional committee report, or in the reports of the hearings, which states or

suggests that Congress intended to engraft any unwritten limitation upon the retroactive relief provided by Section 94(f).

We are remitted, then, to the best and most conclusive evidence of what Congress intended: the explicit and categorical provision of Section 94(f)(1) that excess profits tax relief for the railroads shall extend retroactively to the date of changeover, through year-by-year adjustments of equity invested capital beginning with the date of changeover.

Nevertheless, if this Court were to adopt the broad conclusive presumption of law advocated by the Government, the clear terms of Section 94(f) and their support in legislative history would be of no avail to Nickel Plate and many other railroads similarly situated. A single act of omission and not of commission on the part of Congress would require the attribution to Congress of an intent to limit the retroactive relief afforded by Section 94(f) to years not otherwise barred by general limitations statutes.

Without more, we submit that application to Section 94(f) of the proposed presumption would, beyond peradventure, override the clearly-expressed intention of Congress. And if this be true with respect to Section 94(f), how can the courts determine the retroactive scope of any tax relief legislation without examining its terms and legislative history?

In the proposed conclusive presumption, the Government has fashioned a Procrustean bed into which it would force every piece of tax relief legislation, regardless of the distortions involved. This, of course, would simplify in favor of the Commissioner a recurring problem of statutory construction; but we cannot believe that this Court will indorse such simplification at the expense of depriving particular taxpayers of particular rights conferred upon them by particular tax relief legislation.

III. The Decided Cases

In its brief on the merits in the instant case, the Government makes two contentions which, among others, are advanced in derogation of the rationale of cases which directly support Nickel Plate's construction of Section 94(f). The Government contends (Br. 14-15) that Congress cannot retroactively extend tax relief to years closed by general periods of limitation, without specifically acknowledging and declaring that it is doing so; otherwise, it is asserted, there is a prohibited repeal by implication of a prior statute, i.e., the general limitations statute. The Government also contends, in closing its brief (pp. 41-45), that it is immaterial whether tax relief legislation be deemed to create new rights or to confirm existing rights.

The first contention is surely a strained and specious invocation of a rule of statutory construction. If the Government were right, the general limitations statute has been repealed many times over. It is obvious, however, that at the most a retroactive relief statute creates an exception to the general period of limitations. And the revenue laws are replete with provisions which, without saying so, make exceptions to other, more general provisions. The second Government contention referred to above is equally strained and unsound. The Government dismisses any distinction between statutes creating rights and statutes confirming rights on the grounds that it is often difficult to tell the difference, and that certain decided cases betray this difficulty. But the fact that many problems of statutory construction are difficult does not mean that, if they are ignored, they will go away. And the Government's purported indifference to the distinction between new rights and confirmed rights is belied by its account (Br. 32-37) of the confused and complex background of Section 117(q)—an account obviously designed to persuade the reader that the enactment of Section 117(q) did no more, for the most part, than confirm existing rights or hasten tax relief already on the way.

Whatever the situation with respect to other retroactive tax relief legislation, it is surely clear that Section 94(f) created a new retroactive right, in abrogation of the terms letter obligations fastened upon the railroads by the Commissioner. And the distinction between such a new right and a mere confirmation of existing rights becomes strikingly meaningful in the light of a well-reasoned line of authority, which, as will appear, also avoids any possible conflict with general periods of limitation.

The line of authority referred to consists of Court of Claims decisions running from *Verckler* v. *United States*, 170 F. Supp. 802, via *Zacks* v. *United States*, 280 F. 2d 829, *Lorenz* v. *United States*, 296 F. 2d 746, to *Eastman Kodak Co.* v. *United States*, 292 F. 2d 901. In these cases, the Court of Claims had to deal with tax relief statutes which, like Section 94(f), were retroactive in terms to years which were closed under general periods of limitation, although Congress failed to acknowledge or specify that such closed years should be opened. As to the closed years involved in those cases, the Court of Claims took note of the fact that the taxes for such years were in the first instance legally and properly due; that only by force of the retroactive relief legislation did the original tax payments become, retroactively, erroneous and illegal overpayments. And the court reasoned that Congress, having created a new statutory right to recover such retroactively-created overpayments of tax, could not have intended that such relief be defeated by the bar of general periods of limitation absent an express qualification to that effect.

The Court of Claims' solution to the problem, in the above-cited cases, is to regard the date of retroactive relief legislation, creating new rights, as the date of constructive "payment" of all taxes theretofore paid, so far as within the retroactive scope of the statute, with the normal period of limitations running from the date of enactment and constructive "payment".

Thus in *Verckler* v. *United States*, *supra*, the court held that the retroactive amendment of 1939 Code provisions

dealing with estate taxes operated to create a new right or cause of action, and that a claim for refund within two years of such enactment was timely. The court held (pp. 804, 806):

> Not until February 20, 1956, when P.L. 417 came into effect, did plaintiff have a right to claim and receive refund of the tax. This was not a claim for taxes previously erroneously or illegally collected, but an election to receive the benefits of a relief statute.
>
> * * *
>
> In summary, P.L. 417 created a cause of action based upon the payment of an illegal and erroneous estate tax; the payment constructively arose as of the date the law was improved; section 910 of the 1939 Code became operative as a limitation period for filing a claim as of that date and not as of the date the previously legally assessed tax was paid.

This Court properly pointed out that to hold otherwise (p. 805):

> This would necessarily reward taxpayers who delay payment of their estate tax while at the same time denying similar treatment to those who meet their responsibilities with celerity.

The *Verckler* rationale was subsequently applied by the Court of Claims in *Zacks* and *Lorenz*, and has been recently well-summarized in *Eastman Kodak Co.* v. *United States*, *supra*, as follows (p. 904):

> We therefore hold that taxes become "erroneously * * * collected" even though when paid, they were due and owing, if thereafter, by reason of a readjustment of price, or a retroactive tax reduction statute, or a recomputation of profits by renegotiation, the taxpayer becomes legally entitled to get them back. From that time, he must be alert to his rights, as other taxpayers must be, and must, within the rather generous periods provided by the statutes, file his claim with the tax authorities.

At page 905, this Court referred to "the development of the *Verckler-Zacks* doctrine" as assurance against hard-

ship where the taxpayer pursues the claim within the specified time after the constructive overpayment of the tax, i.e., after the creation of the cause of action by remedial legislation.

We submit that this is an eminently reasonable solution where a new right or cause of action is created, retroactively extending into years otherwise closed, but Congress has failed, for one reason or another, to specify that closed years shall be opened or to provide a new period of limitations for securing relief under the statute. So construed, Section 94(f) clearly provides retroactive relief for closed years—in keeping with the equally clear intent of Congress.

CONCLUSION

For all of the foregoing reasons, this *amicus curiae* respectfully submits that Section 94(f), as a matter of law, affords retroactive relief for years otherwise closed by general periods of limitation; and that the conclusive presumption advocated by the Government would erroneously and illegally override the clear intent of Congress and the proper construction of the statute.

Respectfully submitted,

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APPENDIX A

Excerpt From Senate Finance Committee Report Underlying the Enactment of Section 94:
(S. Rep. No. 1983, 85th Cong., 2d Sess. 108, 1958-3 Cum. Bull. 1028-1029.)

* * * *

Prior to 1942, class I railroads for many years employed the retirement method of computing depreciation on roadway assets for income-tax purposes, as well as reporting to the Interstate Commerce Commission on this basis. These roadway assets include buildings, bridges, tunnels, water towers, etc., but not the rolling stock, roadbed, or the track. Instead of taking depreciation as the asset is used, under the retirement method, the original cost of an asset (less salvage value) is charged off against income at the time of the retirement of the asset from use. In 1942, the Interstate Commerce Commission ordered class I railroads to change, not later than January 1, 1943, from the retirement method of computing depreciation on roadway assets to the straight-line method. Under the straight-line method of computing depreciation, the original cost of an asset (less salvage value) is charged against income by means of annual deductions over its useful life.

Because of the Interstate Commerce Commission's order, and because during World War II these assets were needed and, therefore, were not retired and charged off against income, the railroads asked the Commissioner of Internal Revenue to permit them to change over, for income-tax purposes, to the straight-line method of computing depreciation. Permission was granted, but only on the condition that the railroads establish a reserve generally of 30 percent of the cost of the roadway assets. The effect of this reserve was to limit the remaining amount which could be recovered by depreciation to the cost of these assets reduced by the 30-percent reserve. Although the railroads objected to this condition, many of them finally agreed to the establishment of this reserve imposed by the

so-called terms letters. The changeovers to the new method of computing depreciation occurred, generally, in 1942 and 1943. A number of court decisions have dealt with the tax effects of the retirement method of computing depreciation and with the tax effects in changing from this method of depreciation to another. These decisions relate to a number of different issues and involve widely varying factual situations. They have, however, thrown some doubt upon the validity of the 30-percent reserve requirement imposed upon the railroads under the terms letters. As a result, the railroads and the Internal Revenue Service have been engaged in a continuing controversy over the tax effects of this change in method of computing depreciation. The amendment made by the House bill is, in essence, a settlement of this controversy.

In the House debate on this bill, it was pointed out that, if the Internal Revenue Service failed to sustain its position in court with respect to the legality of these reserves, it has been estimated that there might be a revenue loss of as much as $273 million for the years 1943 through 1955 and that, for the period 1956 to 1995, there might be a total additional reduction in income taxes of approximately $50 million more than under the provision adopted by the House.

* * * *

APPENDIX B

Stipulation of Facts in Nickel Plate's Pending Court of Claims Case, Docket No. 385-61

The following stipulation is set forth verbatim in the Pretrail Conference Memorandum filed on June 25, 1962, in Nickel Plate's pending case in the Court of Claims, Docket No. 385-61; and the facts thus stipulated are incorporated in the Report of the Commissioner filed in said case on July 23, 1962.

1. The plaintiff is a domestic railroad corporation, subject to the jurisdiction of the Interstate Commerce Commission, with principal offices in the Terminal

Tower Building, Cleveland, Ohio, and has at all pertinent times followed the accrual method of accounting and is the owner of the claims here sued upon.

2. Plaintiff timely filed its excess profits tax returns on the accrual basis for the calendar years 1943 and 1944 with the Collector of Internal Revenue at Cleveland, Ohio, and paid excess profits taxes, not refunded or credited, in excess of the refunds here claimed.

3. As a condition to permission to change from the retirement method of accounting with respect to its depreciable road property to the straight line method of depreciation accounting as of January 1, 1943, the Commissioner of Internal Revenue required plaintiff to agree, *inter alia*, that the prescribed 30% reserve for past depreciation would be used not only for depreciation accounting purposes but to reduce accumulated earnings and profits in the determination of plaintiff's invested capital for excess profits tax purposes. Plaintiff's accumulated earnings and profits were developed and its excess profits tax returns for the years here pertinent were filed in accordance with the then existing ruling of the Internal Revenue Service as set forth in the said terms letter. It is agreed that the terms letter correctly embodies the terms and conditions of the said changeover; that Exhibits A and B of the petition are true copies of the said terms letter and of the plaintiff's acceptance letter; and that said exhibits are incorporated herein by reference.

4. In Section 94 of Public Law 85-866, the so-called Technical Amendments Act of 1958, which was enacted on September 2, 1958, Congress provided for an election by certain taxpayers to reduce the above specified 30% reserve for past depreciation in a manner prescribed therein. Section 94(f) (1) provided affected taxpayers with the basis for recomputation of excess profits taxes previously paid by authorizing the recomputation of accumulated earnings and profits in the manner therein prescribed in determining the equity invested capital under Section 718 of the 1939 Code as of the changeover date and as of the beginning of each taxable year thereafter. Under date of October 13, 1959, the final regulations under Section 94 were

promulgated. On or about November 19, 1959, plaintiff filed an election, claiming the benefits of Section 94.

5. On or about August 1, 1960, and within two years of the enactment of the aforesaid legislation, but after the expiration of the period specified in Section 322(b)(1) of the Internal Revenue Code of 1939 or Section 6511 of the Internal Revenue Code of 1954, plaintiff filed formal claims for refund of the aforesaid taxes, which claims were based upon facts and grounds substantially in accord with those herein sued upon. No other claims have been filed covering the relief sought. Formal action disallowing the said claims was taken by the Commissioner's delegate under date of September 8, 1961. This suit was filed within two years of said disallowance.

6. It is further stipulated and agreed that the case may be submitted to the Court, on briefs and argument, on the legal issue as to whether the claims referred to in Paragraph 5 above were timely filed. If it is held that timely claims were filed, plaintiff is entitled to recompute its accumulated earnings and profits for the years here involved (1943 and 1944, including the effect thereon of any carrybacks properly allowable from 1945 and 1946 of unused excess profits credits) in the manner specified in said Section 94(f)(1), thus increasing its excess profits credits for the pertinent years and entitling it to a refund of excess profits tax paid for the said years, together with interest as provided by law, the amount of which is to be determined under Rule 38(c). It is understood and agreed that the right is reserved to introduce additional factual proof if necessary in any such proceedings to establish the amount of recovery. It is further stipulated and agreed that if it is held the claims referred to in Paragraph 5 above were not timely filed, this suit shall be dismissed with prejudice.

No. 44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA,
Petitioner,

v.

AARON ZACKS and FLORENCE ZACKS,
Respondents.

On Writ of Certiorari to the United States Court of Claims

BRIEF OF ANTON LORENZ AND IRENE LORENZ AS AMICI CURIAE

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The intention of these *amici curiae* is to bring clearly to the attention of the Court one aspect of the question as presented in the briefs of both parties which they consider important to the Court's understanding of the problem, and of the scope of the statute under consideration.

Although Mrs. Zacks was the holder of about fourteen patents at the time of trial and substantially all her income was derived from royalties based thereon, the Court of Claims made no finding as to whether she was a professional or an amateur inventor, and the Government's brief assumes that she was an amateur. The distinction in the effect of P. L. 629 on amateur inventors as com-

pared with professional inventors is quite significant, as will be brought out below. Since the Court's decision in this case may affect both classes, the *amici curiae*, who are admitted by the Government as entitled to the tax treatment accorded to professional inventors, desire to present to the Court the distinction and its legal effects.

These *amici curiae* are plaintiffs in another case in the Court of Claims in which refund is requested by virtue of P.L. 629, the statute involved in the *Zacks* case. The Government filed a motion for summary judgment in the *Lorenz* case on the basis of the statute of limitations, and the court below on December 6, 1961 denied the motion (296 F. 2d 746), on the grounds of the *Zacks* decision, and on the further ground not mentioned in *Zacks* that as to professional inventors such as the *amici curiae* new law was established by reason of the enactment of P. L. 629, and the statute of limitations must therefore be considered to have begun to run from the date of its enactment, in accordance with its earlier decisions in *Eastman Kodak Co.* v. *United States*, 292 F. 2d 901, and *Verckler* v. *United States*, 170 F. Supp. 802.

I. The cardinal rule of statutory construction is to give effect to what Congress did.

In 1956 the Congress of the United States, in P. L. 629 of the 83rd Congress (70 Stat. 404), enacted Section 117 (q) of the Internal Revenue Code, providing that as of 1950 professional inventors should be entitled to capital gains treatment on qualifying sales of patents, and amateur inventors selling patents on a royalty basis should be entitled to capital gains treatment. The capital gains treatment accorded professional inventors was clearly new law for the years 1950 to 1954, since theretofore they were required to report as ordinary income, by admission of the Government (Gov. Br., pp. 11 and 40), while the Gov-

ernment argues that the benefits accorded amateur inventors was simply clarification of existing law. The *amici curiae*, being conceded by the Government to be entitled to treatment as professional inventors (Gov. Br., page 44), first became eligible to file refund claims under this legislation in 1956 when the new law was enacted, the statute of limitations for such claims having previously expired. The issue as to them is whether, by having granted retroactive relief that did not previously exist, but having said nothing about extending the period for filing claims, Congress intended that the statute of limitations should begin to run from the date of the enactment, or only that those who might for some other reason have had claims pending were entitled to the benefit of the legislation, and that the statutory benefits should not apply to those professional inventors who did not have open claims.

The Government's initial argument is that to construe P. L. 629 as granting an additional period for filing refund claims is to disregard the cardinal rule of statutory construction that a subsequent statute ought not be deemed to repeal a previous one by implication in the absence of positive repugnancy. This language was based on the Court's opinion in *United States* v. *Borden*, 308 U.S. 188, 198, which reads in part:

> "It is a cardinal principal of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible."

No question of repeal by implication is involved here. P. L. 629 does not purport to repeal the statutes of limitations applicable to tax claims. The real question is whether, by granting retroactive relief, the Congress intended that the existing statutes of limitation should begin to run, as to the new relief it granted, from the date the remedial legislation was enacted, or from the original date of payment. In the latter event, the claims period

would have expired prior to the enactment of the relief measure.

The controlling inquiry in the Court's consideration of this question is, of course, the intention of Congress. The legislative purpose of the provision giving retroactive capital gains benefits to professional inventors was to grant relief which did not otherwise exist to professional inventors for the years beginning in 1950. The Government's position would completely nullify this purpose. In *United States* v. *Menasche*, 348 U.S. 528, 538, relating to a savings clause contained in a statute, the Court took occasion to say:

> "The Government's contention . . . would defeat and destroy the plain meaning of that section. 'The cardinal principle of statutory construction is to save and not to destroy.' *N.L.R.B.* v. *Jones & L. Steel Corp.*, 301 U.S. 1, 30., 81 L. ed. 893, 907, 57 S. Ct. 615, 108 A.L.R. 1352. It is our duty 'to give effect, if possible, to every clause and word of a statute,' *Montclair* v. *Ramsdell*, 107 U.S. 147, 152, 27 L. ed. 431, 432, 2 S. Ct. 391; rather than to emasculate an entire section, as the Government's interpretation requires."

The Court should attempt to give coherence to what Congress has done. *Achilli* v. *United States*, 353 U.S. 373, 378. If possible ambiguity exists, the problem is to attempt to reconcile the two statutes to give effect to each. *Federal Trade Commission* v. *A. P. W. Paper Co.*, 328 U.S. 193, 202.

II. The clearly expressed intention of Congress to give retroactive relief to professional inventors would be frustrated by denying them the opportunity to file claims.

The direct result of the Government's position is that the retroactive relief intended by Congress to be granted would be denied to all but those who had for some reason filed refund claims. However, the Government has not

made reference to a single statement in the legislative history of P. L. 629 indicating that Congress intended in any manner to restrict the benefits of the retroactive relief provision to a specific group such as those who had made claim theretofore. This Court should require some such showing before reading such an inequitable intention into remedial Congressional action. As the Court said in *Shapiro* v. *United States*, 335 U.S. 1, 31, the Court should read a statute "in a manner which effectuates rather than frustrates the legislative draftsmen".

The Government in its brief states that such legislation is often enacted to apply to a specific case or controversy. However, this is not usually done by public laws, such cases being taken care of by private acts which by their terms grant relief to specific persons. Private legislation extending the statute of limitations in particular cases is not uncommon in especially meritorious cases. See, for example, Priv. L. No. 86-339 as supplemented by Priv. L. No. 87-553 (H. R. Rep. No. 1317, 86th Cong., 2d Sess., and H. R. Rep. No. 1405, 87th Cong., 2d Sess.), and H. R. 4141 of the present Congress passed by the House of Representatives (H. R. Rep. No. 525, 88th Cong., 1st Sess.). It is true that general legislation may be intended to benefit a particular taxpayer or a group of taxpayers, but in every such case a clear legislative intention is shown to do so. There is nothing in the committee reports or debates on P. L. 629 to show that it was intended to relate only to taxpayers who had filed claims which were still pending, or who had initiated litigation prior to its enactment. In fact, insofar as taxpayers in the position of the *amici curiae* were concerned, the filing of a claim or suit prior to P. L. 629 would have been a useless thing, since prior thereto professional inventors had no legal basis under any of the provisions of the Internal Revenue Code of 1939 to receive capital gains treatment on the sale of patent rights which, in their hands, represented

stock in trade and not capital assets (Section 117(a)(1), Internal Revenue Code of 1939).

The Government's argument that the purpose of P. L. 629 would not have been frustrated if a new filing period were not intended may apply to a situation where litigation and claims were pending, on the basis of which legislative clarification is sought. However, it does not apply to the case of professional inventors, where unless a new period for filing claims was established, the express intention of Congress, clearly stated in the committee reports to grant retroactive relief, would be nullified.

The legislative history in connection with the relief granted to professional inventors under P. L. 629 indicates that Congress intended the capital gains treatment made available to professional inventors to apply retroactively for the years 1950 to 1954, and no others, from which it could much more easily be concluded that it intended to allow refund claims only for those years, than that it intended to grant relief only to those who had filed refund claims for those years. As applied in the present situation to professional inventors, where new law was established and new rights created which according to settled authority did not previously exist, so that there was no basis theretofore for filing claim, it is more reasonable to conclude that Congress intended to begin the running of the statute of limitations from the date the relief was provided.

In determining whether a retroactive statute implicitly extends the period for filing claims, the Government recognizes the merit in the rationale of the Fifth Circuit Court of Appeals, which ruled in the Government's favor, establishing the test under which it would recognize the creation of a new right if Congress modifies prior law, as distinguished from clarification of obscurities or resolution of disputed issues. The given basis for the Government's preference of this position over that of the Court

of Claims is that a taxpayer who has reason to expect that the courts will uphold his position can scarcely excuse his failure to file a timely refund claim on the ground that the Commission would have contested it.

Following this rationale, since the Government admits that P. L. 629 eliminated the distinction between amateur and professional inventors (Gov. Br., page 11, footnote 2, and page 40), it follows that professional inventors could not have been expected, prior thereto, to file refund claims, knowing that the courts would have denied them.

The Government's brief indicates that any objections to the Fifth Circuit's classification might be met by treating as right-creating statutes only those which make a clear break with prior law, and not those clarifying obscurities or resolving disputed issues. Further, the Government argues, retroactive measures are intended solely to relieve the hardship of a particular taxpayer whose years are still open, in which cases such legislation may or may not create new rights, so that the legislative purpose can be accomplished without creating a new period for filing claims for other taxpayers. In cases where legislation was enacted only for the benefit of particular persons, Congress has consistently expressed such intention in its committee reports or floor debates. Moreover, the ability and desire of certain taxpayers to press for remedial legislation does not justify the conclusion that Congress intended to benefit only those few and to withhold applicability of the statute from similarly situated taxpayers who have been less active. It is exactly this result which would flow from the adoption of the Government's position—that a professional inventor who had without basis filed a refund claim would be benefited, while the other taxpayers who had correctly concluded that there was no sound basis for making such claim would be penalized for their law-abiding behavior. In the language of the opinion of the Court in *Reconstruction Fi-*

nance Corporation v. *Prudence Group*, 311 U.S. 579, 582, the existence of the right to file claim or suit "would be subject to contingencies which no degree of diligence could control. Ambiguities in statutory language should not be resolved so as to imperil a substantial right which has been granted."

The Government's position would place a premium on the filing of frivolous claims by taxpayers on the possibility of the passage of retroactive legislation to be made applicable to them even though at the time claim was filed it was entirely unfounded. However, the Treasury Department would eliminate even that possibility, since it requires a taxpayer to sign the form prescribed for claims for tax refund (Form 843) certifying under the penalty for perjury that his statements are true and correct, and that he believes the claim should be allowed. Further, after denial of the claim, suit must be commenced, and Rule 11 of the Federal Rules of Civil Procedure and Rules of the United States Court of Claims both provide that the signature of an attorney to a pleading constitutes a certificate that there is a good ground to support it, and that it is not interposed for delay. Similarly, Canon 30 of the Canons of Professional Ethics of the American Bar Association provides that an attorney's appearance is equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

The Government argues that the relief granted to professional inventors was incidental to the principal purpose of P. L. 629, and was simply a windfall, since the sole purpose of Section 117(q) as its legislative history shows was to settle the controversy between the courts and the Commissioner, and it was only because Section 117(q) followed the language of Section 1235 enacted two years earlier that it happened to liberalize the treatment of patent transfers in a manner favorable to professionals. In fact, the Congressional committees were well aware of

the effect of their action on professional inventors, as indicated by the detailed discussions in the committee reports appended to the Government's brief (pages 54-55, 59 and 61), and purposely included a specific provision in the legislation retroactively eliminating the distinction in treatment between amateur and professional inventors. Such relief was not incidental to the elimination of the dispute between the courts and the Commissioner. Perhaps the problem that caused Congress to take up the subject was the existence of the dispute, but P. L. 629 goes far beyond the area of the difference between the judicial and administrative interpretation, and in fact made other changes in the law not under consideration in this litigation. But even assuming, *arguendo*, that the granting of relief to professional inventors was incidental, this is no basis for concluding that Congress really did not intend to do what both the specific language of the statute and the explanatory discussions contained in its committee reports indicated to be its action and the purpose thereof.

The Government points to the alleged oversight of Congress in failing to specify whether the two, three or six year statute of limitations should begin to run from the date of the enactment of P. L. 629. The lower federal courts have adopted the theory of constructive payment on the date of enactment, making the two year statute applicable. However, in the *Lorenz* case claim was filed in a matter of days after the enactment of the remedial statute, and where the intention of Congress to grant relief is so clear, the frustration of that intent should not be grounded on a technical matter of drafting which for purposes of the consideration of the bulk of the claims involved is moot. Certainly claims under P. L. 629 are barred after six years, the only question being whether the two or three year statute may apply. Thus statutes of limitation do exist, the only question being which is applicable, Congress having established the new remedy.

The courts have the authority and the responsibility to make this determination, in order that the clearly expressed purpose of the statute to grant retroactive relief should not be defeated.

The legislative history of P. L. 629 demonstrates that as to professional inventors the Congress was well aware of the fact that it was changing the law, and did so quite purposefully (Gov. Br. pp. 54, 59 and 61). In the absence of any evidence to the contrary, there is no basis for concluding that Congress intended to restrict its relief to any particular group of professional inventors. Therefore the only conclusion to be reached from the Government's line of argument is that Congress deliberately did a useless thing. Certainly such a purpose cannot be imputed.

III. A study of other retroactive statutes indicates that both the executive and legislative branches of the federal government abhor discriminatory measures treating persons similarly situated differently, and clearly so provide in any legislative action having that effect.

The Government's brief appends a summary of retroactive tax measures enacted from 1953 through 1962. It is submitted that the conclusions properly to be drawn from this summary are as follows:

1. In most cases where Congress' attention was called to the situations of a limited number of taxpayers, the statute of limitations was nevertheless opened up for all, showing a non-discriminatory policy in enacting retroactive tax legislation (Gov. Br., pp. 73, 80, 85, 104 and 105).

2. Where legislation was enacted specifically for the benefit of a limited number of taxpayers, the committee reports or floor debates reflect this (Gov. Br., pp. 73, 76, 80, 85, 100, 104, 105, 123, 136, 139, 148, and 149).

3. The Congressional intent to avoid discriminatory treatment was also brought out in legislation specifically opening the statute of limitations for those who had not filed claims (Gov. Br., pp. 95 and 98).

4. In most instances where the statute of limitations was not generally extended, the legislation involved either estate taxes, where it becomes undesirable to reopen closed estates, or statutes which apply to both closed and open years, in which case the entire purpose of the statute would not be defeated by failure to extend the period of limitations (Gov. Br., pp. 76, 126, 129, 132, 135, and 144).

The Government further argues that because in a number of other legislative measures wherein retroactive relief was granted, specific extensions of the statute of limitations were included, while in others such extensions were omitted, Congress was aware of the limitations problem, and its silence in this instance indicates its intention not to extend the statutory period. It is to be noted that in a number of instances where no extension of time was included, the Government argues that the legislative history showed that none was intended, and that in a number of others where specific additional periods were provided, the history showed that Congress intended relief for specific years only or to grant relief only to those who had previously filed claims for those years. This reasoning does not apply to a situation such as that relating to professional inventors, where Congress did not clarify an existing statutory uncertainty, and where the affected taxpayers had no legal basis for having filed claim or suit prior to the new legislation.

To impute to Congress an intention to discriminate between a professional inventor who without basis in statute or judicial decision may have filed claim for refund asserting capital gains treatment for the years 1950 to 1954, prior to the enactment of P. L. 629 in 1956 granting retroactive relief, while depriving those taxpayers who had not filed claims, which certainly must include most of

these who could be benefited by the relief provision, of any remedy, would be to rewrite the statute so as to produce an inequitable result which could only be justified by the most clearly stated expression of Congressional intent to do so. No such discriminatory intent appears here.

The President as well as the Secretary of the Treasury has taken a strong position against discriminatory tax legislation which does not treat alike all taxpayers similarly situated. In the President's 1963 Tax Message, he specifically stated regarding his recommendation with respect to employees' moving expenses:

> "In order to facilitate labor mobility and provide more equal treatment of similarly situated taxpayers, I recommend appropriate extension of this tax benefit to new employees."

H. Doc. No. 43; 88th Cong., 1st Sess, January 24, 1963, page 17. The Secretary of the Treasury similarly pointed to the gross inequality in the treatment of taxpayers existing in this tax provision (*Ibid.*, page 50), and in connection with group life insurance referred to the unfair treatment of employee-purchased life insurance (*Ibid.*, page 51). In a report to the Senate Finance Committee in opposition to a bill which would provide retroactive relief to television component manufacturers who had not paid taxes for the years 1950 to 1954, but would make no provision for the extension of the statute of limitations governing the filing of refund claims on the part of taxpayers who had paid taxes during those years, he pointed out that the taxpayers who had not paid such taxes had obtained a competitive advantage, that "Manufacturers who used tax-paid tubes could not apply for credit or refund in most cases, since most or all of their taxable years prior to September 1, 1955 are probably closed by the statute of limitations", and that "The proposed change in the law would constitute legislative approval of this advantage." Report dated August 21, 1963 to the Senate Finance Committee on S. 1151, 88th Cong., 1st Sess.

IV. Conclusion

With respect to taxpayers accorded treatment as professional inventors, as to whom P. L. 629 granted new relief providing for the first time the right to file refund claims for the years 1950 to 1954, the Court should attempt to carry out the intention of Congress, and to avoid the nullification of the Congressional purpose which would result from construing the statute as withdrawing the only remedy by which the right granted by the legislation could be realized.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 44

UNITED STATES OF AMERICA, PETITIONER

v.

AARON ZACKS AND FLORENCE ZACKS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

The contentions of the respondents are adequately dealt with in our principal brief. This reply brief is addressed solely to the issues raised by the New York, Chicago & St. Louis Railroad Company (the "Nickel Plate") in its brief *amicus curiae.*

In our main brief, we contended that a statute the terms of which are limited to prescribing a rule of substantive tax law cannot properly be read as prescribing also a new limitations period for the bringing of a suit for refund, a subject matter on which the statute is silent. Rather, we argued, the normal statute of limitations remains in force and the suit for refund is barred unless a claim was filed "within three years from the time the return was filed * * * or within two years from the time the

709-232-63——1

tax was paid" (Section 322(b)(1), Internal Revenue Code of 1939). Nickel Plate argues, however, that in the case of a statute which retroactively creates new substantive rights, the date of the adoption of the statute should, for purposes of Section 322(b)(1), be deemed the date of a constructive "payment" of the taxes previously paid (Br. 19–21). Analytically, the argument necessarily turns upon an interpretation, not of the retroactive substantive statute, but of the statute prescribing the limitations period, Section 322(b)(1). In effect, the argument interprets "the time the tax was paid" as meaning, not the time of the remittance, but the time at which a payment of tax becomes, by virtue of a change in the law, an *overpayment*. Under that interpretation, every statute which retroactively creates new rights but is silent as to limitations would automatically operate—by satisfying a condition upon which the application of Section 332(b)(1), as so interpreted, depends—to start the limitations period running anew. Thus, despite Nickel Plate's initial suggestion (Br. 3, 17) that the effect of each retroactive statute should depend upon a search of the legislative materials for a specific indication of Congressional intent—an "intent" on a subject matter with which the statute in no way deals—it in fact contends for a rule of no less universal application than the government's.

In support of the surprising content it would pour into the word "paid," Nickel Plate contends that such an interpretation is necessary to avoid defeating the purpose of retroactive statutes. And as a particular-

ized example of the frustration of Congressional purpose that would otherwise occur, it calls the Court's attention to Section 94 of the Technical Amendments Act of 1958, 72 Stat. 1606. Normally we would not reply at length to a collateral question presented by an *amicus curiae*, but in this instance it seems appropriate to do so. The reason is that Section 94 of the Technical Amendments Act of 1958 is a statute which demonstrates in a uniquely striking way the point we seek to make: that there are many reasons, not always apparent, why Congress might wish to prescribe a new substantive rule applicable to generally barred years without the consequence of reopening the statute of limitations, and that a rule that such a statute reopens the limitations period even when it in no way so provides by its terms would produce wholly unwanted consequences. What is unique about Section 94 is that the reasons for its enactment are documented not only by the usual Congressional materials but also by findings by a Commissioner of the Court of Claims (whose report in Nickel Plate's pending case is appended to this brief) of the extra-Congressional developments leading to its enactment. What those materials show beyond a doubt is that Section 94 was neither more nor less than an *ad hoc* legislative ratification of a settlement agreement designed to avoid litigation—an agreement which had been worked out by representatives of the government and the railroads over a two-year period and which was necessarily applicable only to those railroads which had kept their taxable years open.

1. The circumstances giving rise to the enactment of Section 94, as found by the Commissioner in Nickel Plate's pending Court of Claims action (pp. 14–27, *infra*), may be briefly summarized as follows:

In 1942 and 1943, the Interstate Commerce Commission ordered all Class I railroads to change from the "retirement" to the straight-line depreciation method of accounting for certain roadway assets. Most of the railroads sought permission from the Commissioner of Internal Revenue to change their accounting methods for tax purposes to conform to the new ICC requirement. The Commissioner granted his consent, but only on condition that each railroad agree to set up a reserve (in the amount of 30 percent of the original cost of the roadway properties) reflecting the Commissioner's estimate of the depreciation already accrued as of the date of the change-over in accounting method. Many railroads, including Nickel Plate, signed so-called "terms letters" agreeing to establish such reserves (Fdg. 3). These "terms letters" provided, *inter alia*, that the sum remaining to be recovered through depreciation allowances should be limited to the cost or other basis minus the prescribed reserve, and that accumulated earnings and profits should be reduced by the amount of the reserve (*i.e.*, the amount of depreciation chargeable to prior years) in determining the taxpayer's invested capital for excess profits tax purposes (Fdg. 3). The effect of the latter requirement was to reduce Nickel Plate's excess profits credits for 1943 and 1944 and hence to increase its excess profits taxes for those years.

Several of the railroads (not including Nickel Plate) contended that the conditions imposed by the terms letters were illegal, a position which found support in several court decisions. Throughout 1954 and most of 1955, government officials negotiated with representatives of the railroads in an effort to settle the dispute and thereby avoid extended litigation. It was assumed that the terms of an agreement arrived at by top level officials could be applied on a company-by-company basis through the use of formal closing agreements (Fdg. 6). Preliminary conferences produced a favorable reaction, both from the Commissioner and from the General Counsel of the Treasury (Fdg. 7).

On November 3, 1955, Joseph M. Jones, then counsel for Nickel Plate, wrote Leonard Spaulding (a representative of the Service) that only two of his firm's railroad clients—Nickel Plate not among them—had pending claims involving the excess profits tax issue and therefore would be affected by this phase of the settlement (Fdg. 11). The letter assumed, quite accurately, that the Commissioner would be precluded by existing law from making a refund in the absence of a timely claim.

Two weeks later, at the government's request, a survey was taken of all Class I Line Haul Railways (including Nickel Plate) to ascertain the cost of settling the World War II excess profits tax issue on various alternative bases. This survey, like the Jones letter, was predicated on the assumption that the settlement would be applicable only to railroads with timely

claims pending. Of the 126 railways questioned, 12 reported that they had timely claims pending; 59 that their World War II excess profits tax years were closed or not subject to possible refund claims; 25 that they had paid no excess profits taxes during the war years; and 11 that the excess profits tax controversy did not, for various other reasons, involve them (Fdg. 11). The replies of the 12 railroads who stood to benefit from a compromise of the excess profits tax issue showed that the net tax loss to the government would be $10,500,000 or $13,901,651 or $17,300,000, depending on whether the 30% reserve requirement was reduced to 15%, to 10%, or to 5%. Nickel Plate, of course, was not one of the 12 railroads expected to qualify for a refund.

The above information was given to representatives of the government in late November, 1955, and another conference held on December 5. There Fred Scribner, General Counsel of the Treasury Department, outlined what he regarded as a fair solution to the controversy. He insisted, however, over the protests of the railroad spokesmen, that the arrangement must be approved by Congress, in view of the large amounts involved and the possible political ramifications if the action were taken administratively (Fdg. 12). Accordingly, in June 1956, a bill was introduced in Congress embodying essentially the same excess profits tax provisions that were enacted two years later as Section 94(f)(1) of the Technical Amendments Act of 1958 (Fdg. 13). Those provisions adhered closely to the terms of the proposed administrative settlement

and called for a reduction of accumulated earnings and profits as of the change-over date, not by the 30% reserve required by the "terms letters," but by the amount of depreciation sustained before March 1913 (Fdg. 12; § 94(f)(1)).

2. The hearings and debates on Section 94 make it clear that the sole purpose and effect of that provision was to place the congressional seal of approval upon the settlement agreement described above. In introducing the House proposal (Section 81 of H.R. 8381) which was ultimately enacted as Section 94 of the Technical Amendments Act of 1958, Congressman Wilbur Mills, Chairman of the House Ways and Means Committee, stated (104 Cong. Rec. 1222):

> Mr. MILLS. Mr. Chairman, let me take just a moment to advise the membership of the Committee that this amendment is interpreted by the membership of the Committee on Ways and Means as legislating into law a settlement. Frankly, that is what I interpret it to be.
>
> * * * * *
>
> Since that time [1942] a number of court decisions have dealt with the tax effects of the retirement method of computing depreciation and with the tax effects in changing from this method. These decisions relate to a number of different issues. They involve widely varying factual situations and relate, of course, to a very complicated subject. In general, they have thrown doubt upon the validity of the 30-per cent reserve requirement imposed upon the railroads under the terms letters. As a

result of these decisions, the railroads and the Internal Revenue Service have been engaged in a continuing controversy over the tax effects of this change in method of computing depreciation. The proposed amendment is, in essence, a settlement of this controversy. We are, in effect, legislating into law this settlement.

If the Internal Revenue Service failed completely to sustain its position in court, it has been estimated that there might be a revenue loss of as much as $273 million—in refunds and interest—for the years 1943–55, and that, for the period 1956–95, there would be a total reduction in income taxes approximately $50 million greater than under the proposed amendment. If the amendment is adopted, the Government will pick up approximately $250 million which it would have lost if it failed to sustain its position in court, and, in addition, will pick up an additional $50 million by limiting the deductions for the years 1956–95.

Similarly, during the Senate Finance Committee hearings on the bill, after passage by the House, Senator Paul Douglas expressed concern as to the amount of the revenue loss entailed by the proposed amendment compared with the loss which would result if the controversy went to litigation. Thus, in a colloquy with a representative of the American Association of Railroads (Hearings before the Senate Finance Committee, *infra*, pp. 382–385, fully set forth in the footnote below),[1] Senator Douglas stated his under-

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[1] *Senator Douglas.* Mr. Hellenbrand, did you represent the Association of American Railroads in the negotiation of the agreement which resulted in section 81?

standing that "an out-of-court settlement has been made between the Treasury and the railroads which the Congress is now asked to legitimatize by enacting into law"; he inquired as to "the estimated total amount that either was in litigation or would be in litigation if section 81 were not passed," and suggested that attorneys for the government be asked "to come down here

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Mr. Hellenbrand. I participated as a representative of the committee.

Senator Douglas. Was there any evidence on this submitted to the House Ways and Means Committee?

Mr. Hellenbrand. A subcommittee of the House Ways and Means Committee held a hearing for, I believe, a full morning, at which I testified.

Senator Douglas. Was it included in the original bill submitted by the House Ways and Means Committee to the floor?

Mr. Hellenbrand. It was not.

Senator Douglas. It was added as a floor amendment, by Congressman Mills.

Mr. Hellenbrand. Yes, sir.

Senator Douglas. Does this represent an agreement between the Treasury and the Association of American Railroads?

Mr. Hellenbrand. Well, it represents the result of the efforts of the representatives of the Treasury Department and the committee representing the association.

Senator Douglas. How many cases are in litigation now, Mr. Hellenbrand, on this point?

Mr. Hellenbrand. I know of two at least. And the Treasury Department, as I understand it, and the Department of Justice, have deferred moving the trials on these cases pending resolution of this question by legislation, so that the cases have not progressed further for that reason.

Senator Douglas. How much do you think is involved?

Mr. Hellenbrand. Senator Douglas, I think in the statement before you I have a table in the back, on page 11, which shows the effect of the situation as it now is, and as it would be under the court decisions as we interpret them.

And you will notice, sir, that the effect of the bill is to deny refunds entirely for the prior years. And the further effect

and give an account of this, and find out how much we got, how much the taxpayers got, how much the railways got, and what the prospects would have been of recovery if suit had been carried on, and so forth." (Hearings before the United States Senate Committee on Finance on H.R. 8381, 85th Cong., 2d Sess., pp. 383, 385.)

Again, in testimony before the Senate Finance Committee (Senate Hearings, *supra*, p. 387), Dr. Paul Zeis, Financial Vice President of the Akron, Canton & Youngstown Railroad, stated:

> Section 81 deals with the so-called terms letter railroads. This section is presented as an

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of the bill is to reduce the amount of allowable deductions which would be available to us under the statute, as compared to what they would be if the court decisions were applied.

I might add——

Senator Douglas. I do not think your answer was very responsive to my question. What I am trying to get as is, What is the estimated total amount that either was in litigation or would be in litigation if section 81 were not passed?

* * * * * * *

Senator Douglas. Let's see if I understand the situation. In effect an out-of-court settlement has been made between the Treasury and the railroads which the Congress is now asked to legitimatize by enacting into law?

Mr. Hellenbrand. I think that is substantially what the chairman of the Ways and Means Committee said when he presented the bill in the House.

I should add, however, Senator, that this agreement, as it has been characterized here, we are fully satisfied is entirely consistent and applying the principles that have been laid down by the courts in this very complex system of group accounting and the refund problem that is involved.

As a matter of fact, the railroads have given up, in one area particularly, an item to the Treasury amounting to $100 million of deductions in this process which we think is perhaps beyond

agreed measure between the major railroads and the Treasury Department. We have no objection to section 81 as such. We should like to point out, however, that section 81 simply involves legislative confirmation or approval of an administrative settlement that has been worked out between the major railroads and the Treasury Department. In other words, what is being asked is congressional sanction for an administrative compromise or modification of the terms letter agreements which could be affected without legislation by closing agreement or otherwise.

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that which the courts have done, and we feel quite sure of that.

But in order to expedite the disposition of this problem, which is already old, we have been willing to do this.

Senator Kerr. Will the Senator yield?

Senator Douglas. Yes.

Senator Kerr. Is it correct to say, not that the Treasury and the railroads have made an agreement as to what the law ought to be, but that they have arrived at the conclusion jointly that this would be the method of complying with the law as declared by the courts?

Mr. Hellenbrand. Yes, sir.

Senator Douglas. I think this issue should be raised before the committee, Mr. Chairman, rather than addressed to the witness. I think there is a very real question here whether this is a settlement that should be put into statute law or a settlement which could be arrived at between the attorneys for the Government and the railways directly without constitutional sanction.

And if it is desired to put it into law, then I think we ought to ask the attorneys for the Internal Revenue—who are the Government attorneys in this case.

Mr. Hellenbrand. The Treasury Department and the Internal Revenue Service.

Senator Douglas. I think we ought to ask the attorneys for the Government to come down here and give an account of this, and find out how much we got, how much the taxpayers got, how much the railways got, and what the prospects would have been of recovery if suit had been carried on, and so forth.

3. The import of this legislative history is clear. If the out-of-court settlement had been put into effect without submission to Congress, only those railroads in a position to litigate the excess profits tax issue—*i.e.*, only those which had filed timely refund claims—would have benefited from its terms. It was not the purpose of Section 94 to broaden the application of the compromise agreement, or to confer upon any railroad benefits which it plainly could not have obtained through litigation. On the contrary, the impetus for the legislation came, not from the railroads, but solely from the Treasury, which was unwilling to accept responsibility for a compromise of such magnitude. The question Congress was asked to decide—and the one to which Congress addressed itself—was whether the proposed arrangement was a favorable settlement from the government's standpoint, *i.e.*, whether it would cost the Treasury less than the railroads might reasonably expect to win by going to court. Plainly, therefore, the congressional intent would be completely defeated if Section 94 were given the effect of authorizing refunds of excess profits taxes paid 15 or 16 years earlier by 59 railroads, only a handful of which had claims not already barred by the statute of limitations.

It is worth pointing out, finally, that the Technical Amendments Act of 1958 contained 103 sections, eight of which (§§ 14, 29, 36, 63, 92, 93, 96, and 100) expressly extended for grace periods of sixty days (§ 96), six months (§§ 14, 36, and 92), one year (§§ 29, 93, and 100), or a period measured either by the date of pub-

lication of regulations or revocation of an election permitted by the section (§ 63), the time for filing refund claims otherwise barred. Two of these were the sections immediately preceding Section 94, and three of these (§§ 29, 36, 63), like Section 94, permitted taxpayers to elect whether their substantive provisions were to apply. The only possible inference is that when Congress intended to reopen closed years, it did so explicitly.

Respectfully submitted.

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OCTOBER 1963.

APPENDIX

In the United States Court of Claims

No. 385-61

(Filed July 23, 1962)

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

v.

THE UNITED STATES

REPORT OF COMMISSIONER

To the honorable the CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

Pursuant to the order of reference in the above-entitled case, the undersigned Commissioner makes the following report of his findings of fact:

1. Plaintiff is a domestic railroad corporation, subject to the jurisdiction of the Interstate Commerce Commission, with principal offices in Cleveland, Ohio. At all pertinent times plaintiff has followed the accrual method of accounting and is the owner of the claims here sued upon.

2. Plaintiff timely filed its excess profits tax returns on the accrual basis for the calendar years 1943 and 1944 with the Collector of Internal Revenue at Cleveland Ohio, and paid excess profits taxes, not refunded or credited, in excess of the refunds here claimed.

3. (a) The Acting Commissioner of Internal Revenue sent a "terms" letter to plaintiff under date of September 15, 1944, which reads as follows:

> Reference is made to your letter dated March 20, 1943, in which you apply for permission to change from retirement to depreciation accounting with respect to road property.
>
> Permission will be granted to change from retirement to depreciation accounting effective January 1, 1943, with respect to the accounts tabulated below, provided you irrevocably agree:
>
> (1) that a reserve for depreciation shall be computed as of December 31, 1942, on all depreciable property included in these accounts in accordance with the summary tabulation set forth below;
>
> (2) that the remaining sum to be recovered through depreciation allowances shall be limited to the cost or other basis less the depreciation so accrued;
>
> (3) that neither the change of method nor the amount of depreciation so accrued shall have any effect on taxable net income for any year ending prior to January 1, 1943;
>
> (4) that the depreciation rates agreed to are subject to modification if subsequent experience indicates that revision is necessary in order to spread the cost of the assets over their remaining useful lives, such revision however, is not to be made retroactive;
>
> (5) that complete depreciation accounting in accordance with all the applicable sections of the Internal Revenue Code and Regulations shall be adopted for these accounts;
>
> (6) that the reserve for depreciation accrued to the date of the change from retirement to depreciation accounting shall reduce accumulated earnings and profits in the determination

of invested capital for excess profits tax purposes.

Account No.	Classification	Cost at Dec. 31, 1942	Rate [1] (Percent)	Accrued depreciation at Dec. 31, 1942
2½	Other right-of-way expenditures	$[illegible], 102.00	1.39	$90,071.48
3	Grading	2,709,780.00	1.66	625,[illegible].80
6	Bridges, trestles, and culverts	12,124,789.89	1.60	2,898,981.75
13	Fences, snowsheds, and signs	[illegible],205.00	2.00	442,197.80
16	Station and office buildings	8,[illegible],618.00	2.19	1,652,015.45
17	Roadway buildings	232,752.00	2.10	86,[illegible].69
18	Water stations	1,[illegible],[illegible].00	2.[illegible]	370,709.11
19	Fuel stations	468,420.00	2.17	169,200.98
20	Shops and enginehouses	3,071,[illegible].00	1.[illegible]	1,040,709.[illegible]
26	Telegraph and telephone lines	287,[illegible].40	2.[illegible]	106,911.87
27	Signals and interlockers	3,342,175.00	2.10	1,180,799.94
29	Power plants	27,345.00	1.[illegible]	7,878.91
31	Power-transmission systems	167,[illegible].00	2.[illegible]	41,910.60
35	Miscellaneous structures	55,210.00	2.[illegible]	20,[illegible].54
37	Roadway machines	319,[illegible].00	5.25	127,[illegible].24
39	Public improvements—construction	2,[illegible],108.00	1.49	[illegible],426.85
44	Shop machinery	1,[illegible],[illegible].00	2.[illegible]	567,951.80
45	Power-plant machinery	190,[illegible].00	2.96	74,051.73
765	Miscellaneous physical property	1,[illegible],579.00	1.[illegible]	506,873.70

[1] Applicable to gross cost.

It is mutually understood that this is an agreement in principle and that a detailed investigation of the depreciation basis has not been made by the Bureau, and that the basis may be corrected to conform to the allowable basis under the Internal Revenue Code should investigation disclose errors of cost or valuation. In the event of any such correction, the accrued depreciation at December 31, 1942, shall be appropriately adjusted, but no retroactive adjustment shall be made to depreciation which may have been allowed subsequent to December 31, 1942.

It is further mutually agreed that the road assets listed below, which have been retired in 1943, or are to be retired in 1944, have not been included in the basis for depreciation, and that retirement losses are to be allowed on the abandonment of these assets. In the determination of these losses, however, the

amounts stated shall be reduced by the depreciation sustained prior to March 1, 1913.

MAJOR ASSETS RETIRED OR TO BE RETIRED IN YEAR DESIGNATED AND EXCLUDED FROM THE DEPRECIATION BASIS

Account No.	Classification	Year 1943	Year 1944
6	Bridges, trestles, and culverts	$91,628.00	$10,997.00
16	Station and office buildings	7,972.00	14,752.00
18	Water stations	915.00	37,573.00
20	Shops and enginehouses	28,224.00	25,700.00
27	Signals and interlockers	94,703.00	258,993.00
44	Shop machinery		47,072.00

Permission to change from retirement to depreciation accounting as of January 1, 1943, will become effective upon receipt of a letter agreeing to all the terms and conditions set forth herein, signed with the corporate name and pen signature of the president, vice-president, or other principal officer, over his official title. It is requested that your acceptance letter be submitted in duplicate.

(b) In reply to the above letter, plaintiff sent a letter to the Acting Commissioner of Internal Revenue under date of September 23, 1944, which reads, in pertinent part, as follows:

> The New York, Chicago and St. Louis Railroad Company agrees to all the terms and conditions set forth in your said letter of September 15, 1944, with the understanding that in the event the terms and conditions under which railroads are granted permission to change from retirement to depreciation accounting as set forth in said letter shall be modified or changed by law, regulation, ruling, or otherwise, the fact that The New York, Chicago and St. Louis Railroad Company has agreed to said terms and conditions shall not preclude it from receiving the benefit of any such modifications or changes in these terms and conditions which are applicable to railroads in general, and The

New York, Chicago and St. Louis Railroad Company shall be entitled to the benefit of any such modifications or changes, regardless of this agreement.

(c) Plaintiff's accumulated earnings and profits were developed and its excess profit tax rates for the years here pertinent were filed, in accordance with the then existing ruling of the Internal Revenue Service as set forth in said terms letter. (See finding 3(a), *supra.*)

4. In Section 94 of Public Law 85–866, the so-called Technical Amendments Act of 1958, which was enacted on September 2, 1958, the Congress provided for an election by certain taxpayers to reduce the above specified 30 percent reserve for past depreciation in a manner prescribed therein. Section 94(f)(1) of this Act provided affected taxpayers with the basis for recomputation of excess profits taxes previously paid, by authorizing the recomputation of accumulated earnings and profits in the manner therein prescribed in determining the equity invested capital under Section 718 of the 1939 Code, as of the changeover date and as of the beginning of each taxable year thereafter. Under date of October 13, 1959, the final regulations under Section 94 of the Act were promulgated. On or about November 19, 1959, plaintiff filed an election, claiming the benefits of Section 94.

5. On or about August 1, 1960, and within two years of the enactment of the aforesaid legislation, but after the expiration of the period specified in Section 322(b)(1) of the Internal Revenue Code of 1939 or Section 6511 of the Internal Revenue Code of 1954, plaintiff filed formal claims for refund of the aforesaid taxes, which claims were based upon facts and grounds substantially in accord with those herein

sued upon. No other claims have been filed covering the relief sought. Formal action disallowing the said claims was taken by the Commissioner's delegate under date of September 8, 1961. This suit was filed within two years of said disallowance.

6. Throughout the year 1954 and most of the year 1955, a special committee comprised of a small group of railroad tax lawyers, (hereinafter referred to as the "Committee"), worked with various Government representatives in an effort to secure an overall compromise at the administrative level of certain tax problems created by the action of the Commissioner of Internal Revenue in imposing the 30 percent reserve for past accrued depreciation, as a condition for permission to change from the retirement to the straight line method of depreciation accounting. It was assumed by the Committee that if a pattern could be agreed upon and approved by responsible top-level Government officials, these tax problems could be eliminated and extended litigation avoided by applying the pattern, company by company, evidencing the agreed adjustments by formal closing agreements.

7. Following preliminary conferences which produced a favorable reaction, particularly from Mr. T. Coleman Andrews, then Commissioner of Internal Revenue, and Mr. Albert P. Tuttle, General Counsel of the Treasury Department, a letter was forwarded to the Commissioner by the Committee under date of September 3, 1954, calling attention to the opinion of the Tax Court in the *Akron, Canton & Youngston Railroad Company* case, decided June 25, 1954, 22 T.C. 648, and urging recognition at the administrative level of the illegality of the conditions imposed on the railroads at the time of the changeover. Follow-up conferences were held late in 1954 and early in 1955; but

due, in part, to various changes in top-level personnel in the Treasury Department and Internal Revenue Service, no substantial progress was made. However, during this period the requirement that at least a reserve for pre-1913 depreciation be substituted for the 30 percent reserve crystalized in the minds of Government representatives.

8. Under date of July 18, 1955, Mr. Frank Barnett, Vice President and Eastern General Counsel of the Union Pacific Railroad Company, on behalf of the Committee, wrote a letter to Mr. Laurens Williams, who had recently been named Assistant to the Secretary of the Treasury for income-tax matters, urging "administrative solution to the illegal reduction of the cost basis of railroad ways and structures by an arbitrary amount of 30%", which could be "performed through administrative clarification". On July 27, 1955, Mr. Williams reported that he had reviewed the 30 percent problem with Mr. David Kendall, then General Counsel of the Treasury Department, and with Mr. John P. Barnes, then Chief Counsel for the Internal Revenue Service, and that Mr. Kendall wished to participate in negotiations for an industry-wide settlement.

9. Mr. Barnett again wrote Mr. Williams on September 12, 1955, referred to various circumstances which had delayed the anticipated top-level conference, stated he sincerely felt "that this is a matter which can and should be handled administratively" and urged a conference as soon as Mr. Fred Scribner (who was then succeeding Mr. Kendall as General Counsel of the Treasury Department) would be available. Such a conference was held in Mr. Scribner's office on October 12, 1955. Messrs. Williams, Barnes, and Leonard A. Spaulding, employed in the Interpre-

tive Unit of the Internal Revenue Service, also represented the Government at that conference. Mr. Barnett, as spokesman for the Committee, called Mr. Scribner's attention to the fact that litigation was mounting and urged that the matter be disposed of administratively on an industry-wide basis. During the course of the conference, Mr. Spaulding suggested that a reserve for pre-1913 depreciation should, in any event, be substituted, if the 30 percent reserve was to be eliminated. Mr. Scribner concluded that this phase should be further developed and other details explored before attempting to reach an agreement for disposing of the problem.

10. In line with Mr. Scribner's suggestion, the Committee met with Mr. Spaulding and Ralph Staebner, and other representatives of the Engineering and Valuation Branch of the Internal Revenue Service, on November 1, 1955, for the purpose of exploring the details involved in developing a reserve based upon pre-1913 depreciation. The Government representatives expressed the view that adjustments of depreciation should be made prospective only and it was proposed that January 1, 1955, should be made the effective date, if any compromise agreement were approved. At this conference, Mr. Spaulding indicated he could see that there was a stronger argument for elimination of the Clause (6) condition of the terms letter, relating to the adjustment of earnings and profits for excess profits tax purposes, and he would be receptive to a proposal to allow retroactive relief to that extent. He requested an estimate as to the amount involved in this respect.

11. On the basis of the assumption that the Commissioner of Internal Revenue would be precluded by existing law from making any refund in the absence of a timely claim, Mr. Joseph M. Jones, counsel for

plaintiff, wrote Mr. Spaulding, under date of November 3, 1955, and advised that of the railroad clients of his firm (including plaintiff herein) only the Burlington, Wabash, and Bangor and Aroostook had pending claims involving the excess profits tax phase of the settlement being negotiated and would therefore be affected by this phase of the settlement. Similarly, at Mr. Barnett's request, Mr. A. R. Seder, a vice president of the Association of American Railroads, by circular dated November 18, 1955, advised the Chief Accounting Officers of all member roads of the pending efforts to reach an administrative compromise on the 30 percent problems and requested estimates of refunds, based on varying degrees illegality of 30 percent reserve for "World War II excess profits tax years still open or subject to possible refund claim." This circular stated as follows:

> At the request of a subcommittee of the General Tax Committee having to do with the 30% reserve matter, I today sent to you the following telegram:
>
> "In connection with the discussions of possible basis of compromise on question of 30 percent reserve for past accrued depreciation required by terms letter authorizing change-over from retirement accounting to depreciation accounting for depreciable roadway property, Government representatives have asked for estimate of effect reduction in reserve under Condition 6 of the terms letter would have on excess profits tax liability. To enable us to furnish this information will you please advise (1) what World War II excess profits tax years are still open or subject to possible refund claims and (2) total of estimated net decrease in tax for each open year (giving effect to income tax adjustments) resulting from increase in equity invested capital excess profits tax credit for World War II tax years which would

be caused by a reduction of reserve of 30 percent of depreciable assets to (a) 5 percent, (b) 10 percent, (c) 15 percent. Do not recompute depreciable allowances in developing the foregoing. Will greatly appreciate receiving this information by Friday, November 25, by wire if necessary, for use in further meeting with Treasury officials on Monday, November 28."

You will note that the presently requested estimate relates only to the net decrease in tax which would result from the increase of equity invested capital for World War II tax years if a reduction of the reserve required upon changing from retirement accounting to depreciation accounting were reduced from 30% to (a) 5%, (b) 10% and (c) 15%. Thus, it is not necessary to recompute the depreciation allowance in developing this estimate. Also, you will note that this information is desired by Friday, November 25th, for use at a meeting of the subcommittee with Treasury officials set for Monday, November 28th. In this connection I quote from the letter addressed to Mr. Thomas L. Preston, General Solicitor of this Association, by a member of the subcommittee requesting this information:

"I think it would be of very great benefit to the entire railroad industry if we could have this information available for the November 28th meeting and, therefore, have drafted the enclosed request in the form of a telegram which I request be sent out as soon as reasonably possible."

All of the responses to this circular were tabulated and summarized by Mr. R. L. Ettenger, Jr., Assistant Vice President of the Association of American Railroads, in a letter sent to Mr. Barnett under date of November 29, 1955, which stated, in pertinent part, as follows:

Pursuant to the request contained in your letter of November 17 to Mr. Preston, we asked

all Class I Line Haul Railways to furnish us with an estimate of the net tax decrease which will result from decreasing the 30% reserve set up for unrecorded depreciation when the change from retirement to depreciation accounting was authorized for tax purposes. A copy of our circular of November 18 (which repeats the telegram of the same date) is attached so that you may have before you the exact language upon which the estimates were based. There is also attached copy of an "Alphabetical List of Class I Steam Railways in the United States" which shows the names of the companies addressed.

A summary of the responses to the inquiry shows:

Number of Class I Railways addressed	126
Number of replies received	126

Of the 126 replies received—

12 reported that an increase in equity capital would decrease their net tax liability
59 reported no World War II excess profits tax years open or subject to possible refund claims
25 reported no excess profits tax payments during World War II years
19 reported that they did not change to depreciation accounting during World War II
2 reported that they were on average earnings base
6 reported that their accounts were included in other replies
3 replies were not classifiable, but no reduction in tax was indicated[1]

126

The replies of the 12 railways reporting estimated reductions in their net tax are further refined hereunder:

* * * * *

[1] Under correspondence.

Reduction in reserve from 30% to 10%

Road	1942	1943	1944	1945	Total
AT & SF		$1,005,900	$119,300	$1,228,000	$2,348,169
ACL	(1)	36,945	474,127	222,912	685,984
Bangor & A			32,274	32,204	64,478
C & O			827,000		827,000
CB & Q		625,000	705,341	759,676	2,042,000
NYC	88,200	348,200	174,388		610,000
SP		1,080,760	2,224,279	1,167,200	4,506,265
AGS	34,440	34,440	68,700	31,800	104,420
GS & F	21,646	21,646	46,646	24,034	115,308
T & P		[1] 185,296	[1] 130,818	15,471	130,000
UP		[1] 000,000	74,200	705,109	1,282,000
Wabash			222,000	170,000	322,000
Total	182,628	4,000,322	4,000,067	4,000,004	12,001,661

[1] Inclusive.

This letter also contained comparable figures for the 12 railroads listed above, based on the assumptions that the reserve was reduced from 30 percent to 5 percent and from 30 percent to 15 percent. The total reductions in net tax based on the latter two assumptions were, respectively, about $17,300,000 and $10,500,000. No other such industry surveys were made. Plaintiff is a Class I Line Haul Railway.

12. The above information was made available to Government representatives, and another conference between members of the railroad Committee and representatives of the Treasury Department and Internal Revenue Service was scheduled and held in Mr. Scribner's office on December 5, 1955. Messrs. Williams, Barnes, and Spaulding (identified in findings 8 and 9, *supra*), were present at and participated in, this conference. After a general review of the situation, Mr. Scribner indicated that he thought a fair solution would be to substitute for the 30 percent reserve the appropriate pre-1913 depreciation reserve, with prospective application for all phases, except that retroactive effect would be proper for the purpose of computing earnings and profits under Clause (6) of the terms letter. Following the conference and on

the same day, Mr. Joseph M. Jones, who, as a member of the railroad Committee, attended the conference, dictated a memorandum covering the meeting in which he stated, in part, as follows:

> The new angle which Mr. Scribner then introduced was his conclusion that this should be reflected in legislation. It had been assumed from the previous discussions that this compromise would be made effective through the administrative processes of having each company compute its substitute reserve and consummate the change with a statutory closing agreement.

The railroad representatives who attended the conference protested by pointing out the delay and uncertainties that would necessarily be involved in pursuing the matter through legislative rather than administrative channels. Mr. Scribner replied in substance and effect that, while he was fully aware of the problem and was generally sympathetic, he felt he must pass the responsibility on to Congress in view of the large amounts involved and the possible political ramifications if such action were taken administratively. It was suggested that both sides get together to discuss the form which the legislation should take.

13. Under date of June 25, 1956, H.R. 11917 was introduced in the House of Representatives embodying essentially the same provisions with respect to the excess profits tax feature here involved as were eventually enacted in Section 94 of the Technical Amendments Act of 1958.

14. The parties are in agreement that the sole matter in dispute between them involves a legal issue as to whether the claims for refund (see finding 5, *supra*) were timely filed. The parties further agree that if the court holds that timely claims for refund

were filed, plaintiff is entitled to compute its accumulated earnings and profits for the years here involved (1943–1944, including the effect thereon of any carry-backs properly allowable from 1945 and 1946 of unused excess profits credits) in the manner specified in said Section 94(f)(1) of said Technical Amendments Act (see finding 4, *supra*), thus increasing its excess profits credits for the pertinent years and entitling it to a refund of excess profits tax paid for the said years, together with interest as provided by law, the amount of which is to be determined under Rule 38(c).

Respectfully submitted,

FRANKLIN M. STONE,
Commissioner.

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